83-1511

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN J. STANTON,
A Member of the Bar of the
District of Columbia Court of Appeals,
Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. In disbarment proceedings under the American Bar Association Code of Professional Responsibility, may recommended dispositions of motions challenging the legal merit of the charges be considered together with recommended dispositions of the charges?

2. In disbarment proceedings under the American Bar Association Code of Professional Responsibility, may charges be considered according to an obligation to pursue clients' objectives "as they see them"?

3. In disbarment proceedings under the American Bar Association Code of Professional Responsibility, would such a "recommended disposition" procedural rule and an "as they see them" substantive rule impair the guarantee of assistance of counsel in criminal cases?

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The opinions of the District of Columbia Court of Appeals, not yet reported, are reproduced and appended to this petition.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1257(3) for review of the judgments and decisions of the District of Columbia Court of Appeals entered 30 November 1983 in D.C. App. Cases M124-82 and 83-142 and made final by the order denying rehearing entered 16 February 1984.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"No person shall be ... deprived of life, liberty or property without due process of law," Constitution, Amendment V.

"No ... ex post facto law shall be passed," Constitution, Art. I, Sec. 9(3).

"In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense," Constitution, Amendment VI.

"A person for whom conditions of release are imposed and who, after twenty-four hours from the time of the release hearing, continues to be detained as a result of his inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to review by the the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another

condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer may review such conditions," D.C. Code, Sec. 23-1321(d).

"A lawyer shall not ... neglect a legal matter entrusted to him," Disciplinary Rule 6-101(A)(3), American Bar Association Code of Professional Responsibility.

"A lawyer shall not intentionally ... fail to seek the lawful objectives of his client through reasonably available means permitted by law," Disciplinary Rule 7-101 (A)(1), American Bar Association Code of Professional Responsibility.

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN J. STANTON,
A Member of the Bar of the
District of Columbia Court of Appeals,

Petitioner

v.

DISTRICT OF COLUMBIA COURT OF APPEALS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

STATEMENT OF THE CASE

Petitioner is an attorney admitted to practice before the District of Columbia Court of Appeals (Respondent), which has adopted the American Bar Association Code of Professional Responsibility as the standards governing the practice of law in the District

of Columbia. To enforce these standards, Respondent has established disciplinary agencies to investigate and prosecute allegations of misconduct and transmit reports and recommendations in disciplinary proceedings.

On 30 November 1983, Respondent adopted agency reports and recommendations in D.C. App. Cases M124-82 and 83-142 and ordered that petitioner be "suspended for a year and a day from the practice of law" (77A).[1/] A petition for rehearing and reconsideration of the judgments and suspension order was denied on 16 February 1984, and this petition for review followed.

Petitioner's disciplinary involvement began when Respondent's agency first criticized then admonished him "for his refusal to acquiesce to the plea agreement" (34A) in a criminal case. When petitioner rejected the admonition, he was formally charged "with

1/ See Appendix page 77A, also page 2A.

neglect and with intentionally failing to seek the lawful objectives of his client"[2] (7A) for his "refusal to file a bond review motion"[3] (6A-7A) and with "violations of the same two Disciplinary Rules" (7A) for his position on "accepting the government's plea bargain" (7A) in the same criminal case.

Petitioner "moved to challenge the legal sufficiency" (36A) of the charges "by means of a motion to dismiss" (36A) submitted to Respondent's disciplinary agency, which referred it to a committee appointed to hear evidence on the charges. The committee then denied the motion for the reason that it had "no authority to dismiss charges" (8A).

While these charges were pending, another of petitioner's criminal clients substituted counsel on the eve of trial. When petitioner "asked if there was any reason

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2/ See Disciplinary Rules 6-101(A)(3) and 7-101(A)(1).

3/ See 23 D.C. Code 1321(d).

why he should not sue for the unpaid balance past due" (42A) under the retainer agreement in that case, the client's mother "felt so harassed ... that she complained" (21A), instituting a second disciplinary action charging that petitioner "neglected a legal matter entrusted to him" (19A) in that he "did not investigate the case" (43A).

Next, a third criminal client complained that petitioner had failed "to respect wishes of client to have personal interview" (106A-107A) and "to represent defendant by motions of several sorts" (107A). A third disciplinary action then charged that petitioner had "refused to file a bond review motion," "failed to communicate" (113A) with the client and "failed to assist" (113A) him, thus "neglecting a legal matter entrusted to him" (78A) and perpetrating an "intentional failure to seek a client's lawful objectives" (78A).

Yet a fourth disciplinary action was brought against petitioner at the behest of a trial judge whom petitioner had reported to the District of Columbia Commission on Judicial Disabilities and Tenure for "abuse of judicial authority" (111A). In a criminal case, the judge had "declined to accept" (82A) a plea "according to the standing plea offer" (109A) and "ordered that the case should go forward to trial" (109A) when the defendant hesitated in "apparent confusion" (82A), then, after the trial, had "removed" (82A) petitioner as counsel because "the case should not have gone forward" (109A). When petitioner reported this conduct, a complaint was obtained from the former client charging that petitioner had "made defendant go to trial for the case" (111A). Respondent's disciplinary agency then charged that petitioner had "failed to assist" (113A) the client "at the time of the attempted disposition"

(113A), thus again "neglecting a legal matter entrusted to him" (78A) and perpetrating another "intentional failure to seek the client's lawful objectives" (78A).

The third and fourth of these disciplinary actions were prosecuted before a second appointed committee after the first had recommended discipline in each of the first two actions; thus, separate reports and recommendations were received and docketed by Respondent as D.C. App. Cases M124-82 and 83-142.

Adopting both reports and recommendations almost without comment,[4/] Respondent sustained the agency's refusal to consider petitioner's motion to dismiss, ruling that disciplinary cases were not "to be decided on motions made before the hearing" (8A) but that the "hearing committee is to recommend ... what disposition should be made of any

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4/ Respondent characterized as a "misstatement" the report that petitioner had willfully refused "to pursue the client's lawful objectives" (1A).

motions" (8A) at the same time that it recommends an "ultimate disposition on the merits" (8A) of the charges.

In the first disciplinary action, Respondent held that petitioner had "violated DR 7-101(A)(1) when he refused to file a bond review motion on behalf of his client in the face of her direct instruction" (11A) and again when he had "interjected himself into the court procedure in an attempt to thwart the client's achieving her lawful objective of pleading guilty" (17A-18A).

In the second action, Respondent held that petitioner had "neglected his client's case" (22A) because he had "failed to investigate the case, as charged" (19A) when he "did not attempt to interview the police officers ... examine the torn shirt ... or send someone to investigate the scene" (22A).

In the third action, Respondent held that petitioner had "failed to file a bond review motion when requested to do so by his

client; failed to communicate in any significant fashion with his client; failed to investigate the facts" (82A) and that "the sum total of all these failures violates both DR 6-101(a)(3) (neglect) and DR 7-101(A)(1) (intentional failure to seek lawful objectives" (82A-83A).

In the fourth action, Respondent held that petitioner had "refused in open court to take any affirmative action to further his client's desires" (85A) to plead guilty and condemned petitioner's judgment "as neglect and as a willful failure to pursue the client's lawful objectives" (86A).

In summary, Respondent held that petitioner "arrogates to himself the role of decision maker in his representation of his clients" (90A, 160A), keeps "his clients largely in the dark about the progress of their cases" (90A, 160A), exhibits an "arrogant and abusive manner" (90A-91A, 160A), and "does not seem to have the slightest doubt about the correctness of his behavior in routinely

overruling his client's judgments" (91A, 160A). Respondent ruled that petitioner "owes his clients an obligation to pursue their objectives as they see them" (86A) and must "represent his clients in accordance with their legitimate wishes" (96A), which he may not "overrule" (97A).

For petitioner's "cohesive ... view of his role as a lawyer" (97A), Respondent ordered that he "justify his readmission to active practice" (96A).

ARGUMENT

1. Respondent's New "Recommended Disposition" Procedural Rule for Motions Practice in Disbarment Cases Violates the Federal Constitutional Guarantee of Due Process of Law.

In Respondent's own opinion, it is established that disbarment actions are "adversarial, adjudicatory proceedings. In as much as they are concerned with property rights of respondent attorneys, due process safeguards must be observed," Matter of Thorup,

432 A.2d 1221, 1225 (D.C.), citing In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222.

Ruffalo restated the due process safeguard that "fair notice should be given to the attorney of the charges made and opportunity for explanation and defence," 390 U.S. at 550, 88 S.Ct. at 1226. Respondent's refusal to consider petitioner's motion to dismiss indicates that "the state procedure from want of notice or opportunity to be heard was wanting in due process," Ibid.

Petitioner's motion to dismiss contended that the specified charges failed to clearly allege misconduct and give him fair notice of what to explain or defend against. Taken as true in each averment, the specified charges failed to allege conduct that he could have recognized in advance as "conduct that the courts would condemn," Ruffalo, supra at 554, 88 S.Ct. at 1228, under the disciplinary rules.

Respondent allowed petitioner no oppor-

tunity to be heard on this motion. Respondent has ruled that its appointed committees should make recommendations "both as to the ultimate disposition on the merits and as to any motions" (8A-9A). This "recommended disposition" procedure cannot fairly decide the issue of fair notice if it provides for the "hearing on the merits" (8A) of the disciplinary charges prior to such decision.

Under Respondent's "recommended disposition" rule, an attorney challenging the specified charges as unconstitutional would be forced to defend against a petition "so inadequate as not to allow him to know with what he was charged" (9A-10A) prior to resolution of his challenge. This sequence denies fair notice and violates due process.

2. Respondent's New "As They See Them" Substantive Rule in Disbarment Cases is Ex Post Facto in Petitioner's Cases and Overbroad, Vague and Void in Future Cases.

By Respondent's own ruling, "judicial decisions are, like legislative enactments,

ex post facto, Bowyer v. United States, 422 A.2d 973, 980 (D.C.), if "applied retroactively to change the quantum or kind of proof necessary to show guilt," Id. citing Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, "with regard to the imposition of punishment," United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17, 97 U.S. 1505, 1515. Disbarments "are adversary proceedings of a quasi-criminal nature and disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer," Charlton v. F.T.C., 177 U.S. App. D.C. 418, 421, 543 F.2d 903, 906, Ruffalo, supra

Respondent allowed petitioner no opportunity to be heard on the issue of fair notice and received and based its disbarment decision on proof of guilt according to a new "as they see them" rule for "neglect" and "intentional failure" disciplinary violations. Petitioner's disbarment by this unforeseeable and retroactive expansion of the disciplinary rules is ex post facto, and the

new rule is unconstitutionally vague and overbroad.

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct," Village of Hoffman Estates et. al. v. Flipside, Hoffman Estates, Inc., 102 S.Ct. 1186, 1191. "In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis," Id.

"Vague rules offend the due process clause because they deny a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir.). Such rules impermissibly delegate basic policy matters "for resolution on an ad hoc basis, with the attendant dan-

gers of arbitrary and discriminatory application," Id. at 371, citing Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294.

Nothing could be more vague, overbroad, or fit for resolution on an ad hoc basis than Respondent's new "as they see them" rule, under which there could be no reasonable opportunity for counsel to conform his constitutionally prescribed conduct to avoid charges that he "arrogates to himself the role of decision-maker," "keeps his clients largely in the dark about the progress of their cases," "exhibits an arrogant and abusive manner," or transgresses in "overruling his client's judgments" when he does not "pursue their objectives as they see them."

The Constitution authorizes counsel to adopt strategy "without prior consultation with an accused," Henry v. State of Mississippi, 379 U.S. 443, 451, 85 S.Ct. 564, 569, when necessary, and counsel cannot anticipate when such strategies may result in charges

that he has "arrogated to himself" strategic decisions. Given the complexity of adjudication, it is inevitable that many, if not most clients, will be "largely in the dark" much, if not most of the time "about the progress of their cases." Forceful and effective representation may be seen as an "arrogant and abusive manner," and the objectives of clients "as they see them" are subject to change from day to day or even from moment to moment in the stress of litigation.

Counsel cannot function effectively in the face of a proscription against "overruling his client's judgments" when those judgments are uncertain and formed "largely in the dark." When they are certain and enlightened, counsel's decisions on how to pursue the client's objectives relate to "strategy or tactics and involve elements of discretion and judgment on which skilled and experienced advocates might honestly disagree, particularly after the event," United States

v. Pate, 312 F.2d 161, 162 (7th Cir.).

Respondent's new "as they see them" rule denies counsel a reasonable opportunity to know what it defines as "neglect" or "intentional failure," reaches a substantial amount of constitutionally protected conduct, and is unconstitutionally vague and overbroad.

3. Respondent's New "Recommended Disposition" Procedural Rule and "As They See Them" Substantive Rule Violate the Federal Constitutional Guarantee of Assistance of Counsel in Criminal Cases.

Respondent rules that defendants in criminal criminal cases may compel counsel "to pursue their objectives as they see them." Respondent's new rule reduces counsel's role to that of ordinary agent unable to perform the constitutional guarantee of assistance of counsel in criminal cases.

"The advocate, as an officer of the court which issued the commission, owes an obligation to the court to repudiate any

external effort to direct how the obligations to the client are to be carried out," Polk County v. Dodson, 102 S.Ct. 445, 454, and "it is important to emphasize that in providing counsel for an accused the governmental participation is very limited," Id., for "where the government interferes to restrict effective representation, a per se rule applies that the conviction be reversed," United States v. Green, 220 U.S. App. D.C. 147, 153, 680 F.2d 183, 189. Such interference "seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation," Jones v. Barnes, 103 S.Ct. 3308, 3312.

Respondent would act under the Code of Professional Responsibility to enforce the defendant's new right to compel and to direct how the obligations to the client are to be carried out. Respondent would hold that counsel "should have remained mute in court while the other lawyers conducted the plea procedure" (16A) or that counsel should

have "taken affirmative action to further his client's desires ... in entering his plea" (85A-86A). Respondent would hold that counsel erred when he "made no effort to locate any witnesses ... who could have bolstered his case" (84A) or when he "did not examine the torn shirt" (22A). Such enforcement of "an obligation to pursue their objectives as they see them" would take away from counsel "the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced," Minns v. Paul, 542 F.2d 899, 901 (4th Cir.).

As applied to decisions on motions for pretrial release, Respondent's new ruling is squarely in conflict with applicable Supreme Court decisions. Respondent rules specifically that "if the client, having heard his lawyer's opinion and having understood it,

rejects it and insists upon a bond review motion being filed, the lawyer is obligated to ... ask that the client be released pending trial, for "an attorney is not entitled to substitute his judgment for that of the client in a matter as fundamental" (13A) as that. Contra are decisions ruling that no "defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points," Jones v. Barnes, supra at 3313, and that lawyers are obligated "not to clog the courts with frivolous motions or appeals," Polk County v. Dodson, supra at 452, citing the "ABA Standards for Criminal Justice, Commentary to 4-3.9," which was also cited to Respondent below as the governing law on counsel's responsibility for decisions on motions and pleadings. Under Respondent's new ruling, the defendant who "insists upon a bond review motion being filed" against counsel's advice

would lose the benefit of "counsel's implicit representation to the court that he believes in the legal substantiality of the contentions advanced," Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir.).

Respondent professes concern for the defendant's "legitimate wishes" (96A) where counsel and client disagree, but those wishes may be heard and granted in such cases if the defendant "is allowed to address the court freely on his own behalf and if disagreements ... are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel," cf. McKaskle v. Wiggins, U.S. Case 82-1135, Slip op. at 10, in fact a common practice much preferable to the review of counsel's performance established by Respondent's new ruling.

Counsel charged with "neglect" or "intentional failure" according to Respondent's new "as they see them" rule would defend against such charges under Respondent's new

"recommended disposition" rule, which would foreclose any possibility of fair notice at any point of the disbarment action. Counsel would be forced to abandon professional judgment and to act as ordinary agents to protect themselves from disbarment actions.

In sum, Respondent's new procedural and substantive disbarment rules established in these decisions would interfere to restrict constitutionally effective representation in criminal cases by ad hoc external efforts to direct how counsel's obligations to the client are to be carried out.

CONCLUSION

Respondent's decisions in D.C. App. cases M124-82 and 83-142 are inconsistent and in conflict with applicable circuit and Supreme Court decisions in that they establish a new "recommended disposition" procedural rule and a new "as they see them" substantive rule that violate due process rights in disbarment cases and restrict effective

assistance of counsel in criminal cases. The petition for review of these decisions should be granted.

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Certificate of Service

I certify personal service of three (3) copies of this petition and appendix on Alan I. Herman, Clerk of the District of Columbia Court of Appeals, 500 Indiana Avenue N.W., Washington, D.C. 20001 or his appropriate agent on 14 March 1984.

JOHN J. STANTON

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. M-124-82

IN RE JOHN J. STANTON, RESPONDENT.

A Member of the Bar of the
District of Columbia Court of Appeals

(Argued November 30, 1982 Decided November 30, 1983)

Before NEBEKER, FERREN and BELSON, *Associate Judges.*

PER CURIAM: This matter is before us for our consideration of the Report and Recommendation of the Board on Professional Responsibility (Board).

The Board has found one instance of respondent's "neglect of a legal matter entrusted to him" in violation of DR 6-101(A)(3) and two acts of respondent's "intentional failure to seek a client's lawful objectives" in violation of DR 7-101(A)(1).[1] The Board recommends suspension of respondent for sixty (60) days. We accept the Board's findings of fact as being supported by substantial evidence of record, and adopt the Board's recommended suspension of respondent for sixty (60) days.[2]

[1] We note that at one point in discussing the recommended sanction, the Board's report to "three instances of willful refusal to pursue the client's lawful objectives" rather than the violations just identified. In our view this isolated misstatement does not vitiate the Board's recommendation.

[2] We also agree with the Board that respondent's contentions concerning certain asserted improprieties in the conduct of his disciplinary proceedings are similarly without merit.

Accordingly, it is ordered by the court that respondent, John J. Stanton, be and he hereby is suspended for sixty (60) days from the practice of law for the reasons set forth in the appended Report and Recommendation of the Board. Respondent's sixty (60) day suspension is to be served concurrently with his suspension of a year and a day for similar disciplinary rule violations entered this day in *In re John J. Stanton*, No. 83-142 (D.C. November 30, 1983).

This order of suspension shall be effective thirty (30) days from the date of this opinion. D.C. Bar Rule XI § 19(3).

So ordered.

3

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Bar Docket Nos. 180-79,
468-79, and
258-80

IN THE MATTER OF JOHN J. STANTON

Bar No. 168997

REPORT AND RECOMMENDATION

Two separate reports concerning two separate petitions against the same respondent have been brought before this Board within a relatively short period of time. As has been our practice in other cases, we have consolidated the two cases in one Report and Recommendation to the Court of Appeals, and we recommend to the court a single sanction encompassing all of the conduct found to be in violation of the Code on Professional Responsibility.

I. *THE BENJAMIN CASE.*

Docket Nos. 180-79 and 468-79 are before the Board on Professional Responsibility on the report of Hearing Committee No. 2. The Hearing Committee was confronted by a petition that concerned three separate charges arising out of respondent's conduct of the defense of Peggy M. Benjamin against criminal charges. For convenience, the three matters can be identified as the "bond review" matter, the "government plea offer" dispute, and the issue concerning the quality of respondent's communications with his client.

On the bond review matter, the Hearing Committee concluded that respondent had "intentionally fail[ed] to

seek the lawful objectives of his client through reasonably available means permitted by law" in violation of DR 7-101(A)(1).[1] In connection with the violation found on the bond review matter, the Committee recommended an informal admonition as the appropriate sanction.

In connection with the government plea offer matter, the Hearing Committee concluded that Bar Counsel had failed to make out a violation of DR 7-101(A)(1) (intentional failure to pursue the client's lawful objectives) in connection with respondent's failure to assist his client in entering her plea of guilty. The Committee recommended that the charges based on the government plea bargain matter be dismissed.

Finally, the Hearing Committee recommended that we find that Bar Counsel had failed to make out a case of neglect on his charge that respondent had failed to communicate adequately with his client and had failed adequately to advise her. Finding no violation, the Hearing Committee recommended dismissal.[2]

This Board agrees with the Committee's finding that a violation was made out in connection with the bond review matter but disagrees with the Committee's conclusion that no violation was proved in connection with the government plea offer matter.

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[1] The Committee did not pass upon an additional allegation based upon the same set of facts that respondent was also guilty of neglect in violation of DR 6-101(A)(3). The Board agrees with the Committee's disposition of the neglect charge.

[2] Bar Counsel has not opposed the Committee's proposed dismissal of either the government plea offer charges or the failure to communicate charges.

A. *Ms. Benjamin's Criminal Cases.*

Ms. Benjamin had a number of criminal cases pending against her at roughly the same time. The procedural history of the relevant cases are summarized in detail in the report and recommendation of the Hearing Committee, and we do repeat that history here. By way of brief summary, Ms. Benjamin had two criminal cases pending against her in the Superior Court at the same time. The first, which the Hearing Committee labeled the "underwear case," was based on a charge of attempted larceny of assorted underclothing from Hecht's department store. Respondent was appointed to represent Ms. Benjamin in the underwear case.

The second case, which the Hearing Committee labeled the "crabmeat case," was also a charge of attempted larceny. Ms. Benjamin was represented by other counsel, particularly Mr. Bright, in the crabmeat case.

It was uncontested in the record before the Hearing Committee that at the time of Ms. Benjamin's arraignment on the underwear case, her bond was set at $1,000 with a 10% payment. Not having the requisite $100 to secure her release, Ms. Benjamin was incarcerated. It is also uncontested that Ms. Benjamin sent respondent a letter requesting him to file a bond review motion for her. Her request was unequivocal.

Respondent did not answer Ms. Benjamin's written request. A few days later Ms. Benjamin telephoned respondent from the District of Columbia Jail and renewed her request to him to file a bond review motion.

Respondent admits that after the letter and the telephone conversation outlined above, he did not prepare or file a bond review motion or make any other effort to obtain Ms. Benjamin's release from the District of Columbia Jail by helping her to secure the necessary $100.

Consequent to respondent's inactivity, Ms. Benjamin remained in the District of Columbia Jail for seventeen days until her son, who had been out of town, returned to Washington and posted the requisite $100.

After Ms. Benjamin's release, respondent received a plea offer from the United States Attorney. Her two sets of lawyers disagreed about the advisability of her accepting the government's plea offer. The lawyers representing Ms. Benjamin on the crabmeat case concluded that acceptance of the government's plea offer was in the best interests of Ms. Benjamin. Respondent, on the other hand, concluded that the plea offer was not in Ms. Benjamin's best interests and he so recommended to her.

Respondent concedes that he had an adequate opportunity to urge his views upon Ms. Benjamin and that she was competent to make the decision whether to plead guilty. After consideration of the competing advice of her two sets of lawyers, Ms. Benjamin concluded that she wished to accept the government's plea offer. Accordingly, Ms. Benjamin's other lawyers arranged for a hearing before Judge Neilson on October 15, 1979, at which time Ms. Benjamin was to plead guilty in both the underwear and crabmeat cases and to be sentenced.

At the hearing, respondent volunteered to the Court that he had advised Ms. Benjamin that the plea arrangement was "improvident and unwise" and respondent asked Judge Neilson to take this fact into account in the Rule 11 proceeding that he was then conducting on Ms. Benjamin's attempts to plead guilty. Ms. Benjamin's plea was accepted over respondent's objection, and she was sentenced.

As noted above, Bar Counsel brought a petition alleging three areas of misconduct: (1) in connection with the respondent's failure or refusal to file a bond review

motion, Bar Counsel charged him with neglect and with intentionally failing to seek the lawful objectives of his client; (2) in connection with respondent's failure or refusal to assist Ms. Benjamin in accepting the government's plea bargain, Bar Counsel charged violations of the same two Disciplinary Rules; and (3) Bar Counsel charged respondent with failure to conduct meaningful communication and to provide assistance to his client amounting to a violation of the Disciplinary Rule prohibiting neglect.

B. *The Hearing Committee's Conduct of the Proceedings Below.*

Respondent has briefed and argued several points concerning the conduct of the proceedings below. His arguments are not well taken.

1. *Respondent's Charge That Bar Counsel Misled the Contact Member.*

First, respondent brings a welter of charges the net effect of which is that Bar Counsel hoodwinked a contact member into approving an informal admonition by presenting false and incomplete evidence to the contact member. Respondent's argument is put to rest by the Hearing Committee's finding of a disciplinary violation and by the disposition that we make of this case. Whatever evidence Bar Counsel presented to the contact member, there was more than probable cause, there was in fact clear and convincing evidence that respondent had violated one or more provisions of the Disciplinary Code. The requirement that a contact member review and approve petitions and informal admonitions is meant to act as an additional protection for respondents so that they are not faced with wholly unsubstantiated charges. Our

review of the record convinces us there was more than adequate probable cause to go forward on this case.

There is no review of the probable cause determination provided for in our system any more than there is a review of the probable cause determination readily available to a defendant in a criminal case where the full panoply of due process rights applies. If this Board is to perform its functions of fairly and speedily determining when violations of the Disciplinary Code have occurred and of protecting the public from those who violate the Code, our proceedings cannot be allowed to descend into a hodgepodge of interlocutory reviews. The essence of fairness in our proceedings is that the matter is brought as promptly as possible before a hearing committee which hears the matter in a fair and even-handed way.

2. *Respondent's Motion to Dismiss the Petition As Defective on Its Face.*

Turning next to respondent's argument that the petition should have been dismissed on its face, we also cannot agree with its contentions. Our rules do not provide, nor do we think they must, for cases to be decided on motions made before the hearing.

As we said in *In the Matter of Erias Hyman*, Bar Docket No. 69-79, a hearing committee has no authority to dismiss charges. A hearing committee is to recommend to this Board what disposition should be made of any motions brought by respondent. If the motion requires the taking of evidence, the hearing of that evidence should be consolidated with the hearing on the merits. Recommendations both as to the ultimate disposition on the merits and as to any motions are then

made by the hearing committee upon the basis of a fully developed factual record.

Once again, the same values are at stake. If this Board's procedures are not to suffer more complication and delay than now attends them, we must be careful not to allow procedural issues and motions practice to distract the Board's attention from the central questions: was there a violation and, if so, what sanction is appropriate. While the fundamental aspects of procedural fairness must be, and we believe are, observed, we must also bear in mind that these are not criminal cases and that the several layers of procedural due process protections that exist in criminal cases are inappropriate in the disciplinary system.

Respondent argues strongly that no lawyer should be put to the trouble and inconvenience of a hearing on a petition that is faulty on its face. Respondent's case does not test his argument since no fault appears on the face of the petition that respondent has attacked in this case. However, we feel bound to say that the inconvenience of a hearing before one of our committees is not a reasonable price to pay for the privilege of holding a license to practice law. This is particularly true in light of the fact that charges are brought only after a contact member of a hearing committee concurs with Bar Counsel's probable cause finding.

Once a basis of that sort has been laid, then the underlying purposes of the Board require that we proceed directly to a hearing on the merits rather than being detoured into questions of pleading and form. While the Board would have no hesitation in recommending dismissal of a case in which the respondent was not fairly notified of the charges against him because the petition was so inadequate as not to allow him to know with

what he was charged, that determination is made at the Board level so that any possible objection to the petition can be considered together with the factual record in the case.

3. *Respondent's Challenge to the Hearing Committee Chair's Power to Conduct Pre-Hearing Proceedings.*

Last, we address respondent's argument that the hearing committee chairman acted beyond his authority when he conducted two pretrial conferences and disposed of certain matters in an attempt to simplify and expedite the hearing before the Committee. Respondent recognizes that our rules do indeed authorize a committee chair to act in this regard. Chapter 8, Section 3, Subsection (j) of the Board's Rules. However, respondent claims that a contradictory rule of the Court of Appeals requires that a hearing committee can act only by all three of its members. Rule XI, Section 5(b), District of Columbia Court of Appeals. However, we believe that the rule respondent cites refers only to the final reports and recommendations that hearing committees make to this Board.[3] Therefore, we do not feel there is any contradiction between that rule and the Board's rule that allows a hearing committee chair, acting alone, to dispose of certain procedural matters before the hearing begins.

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[3] The *reductio ad absurdum* of respondent's argument is that the hearing committee chairman, acting alone, could not grant continuances of hearing dates (Chapter 8, Section 1 of the Board's Rules), consider motions for additional discovery (Chapter 3A, Section 3 of the Board's Rules), or make recommendations concerning deferral of cases assigned to a hearing committee (Chapter 4 of the Board's Rules). We do not think respondent's view can be sustained.

We wish to take this opportunity to encourage the chairs of the various hearing committees to utilize the pre-trial procedures provided in our rules. We also point out that, contrary to respondent's arguments, the hearing committee chair is under no obligation to consult with other members of the committee in making such pre-hearing determinations. The chair in this case chose to consult with the other attorney member of the committee before making his rulings. He was certainly within the spirit and letter of our rules when he chose to consult with his fellow committee member. However, we wish to make it absolutely clear, that he was under no obligation to do so and was free to act alone.

Of course, a hypothetical respondent who felt that a pre-hearing ruling of a chairman had deprived him of valuable rights would be free to raise the issue again before the hearing committee. In that event, we trust that the hearing committee would make a recommendation to this Board as to how the matter should be disposed of. Full review occurs at the Board level.

Once again, it is important not to allow our procedures to become bogged down in multiple determinations and redeterminations of issues that are properly committed to the chair of the hearing committee. The twin goals of our proceedings always must be swiftness and fairness.

C. *Respondent's Refusal to File a Bond Review Motion.*

We agree with the Hearing Committee's conclusion that respondent violated DR 7-101(A)(1) when he refused to file a bond review motion on behalf of his client in the face of her direct instruction to do so. A lawyer who refuses to file a motion as fundamentally important as a bond review motion after being instructed to do so

by his client is in violation of the disciplinary rules except in certain unusual circumstances .

The factors involved in a judge's decision to reduce the severity of a criminal defendant's conditions of release are so subjective that no lawyer can be sure that such a motion would be frivolous except in certain clear-cut cases. To be sure, if the client is subject to a five-day hold, is also arrested on an escape warrant from another sentence, has been revoked on his probation or parole, or otherwise has no possible chance of being released, then an attorney might be justified in refusing to file a bond review motion despite his client's request. Such a motion might be frivolous, and the lawyer would have an obligation not to burden the court with a pointless motion.

On the other hand, where the client can theoretically be released, then a bond review motion should always be filed when requested by the client.[4] It is simply impossible to predict with absolute certainly how a court will react to such a motion. Sometimes even the mere passage of time will convince a judge to reduce the severity of the conditions of release. Thus, the motion should always be filed when the client insists upon exercising his absolute statutory right to such a motion unless the lawyer determines that the motion would be wholly frivilous. D.C. Code § 23-1321(d).

This is not to say that a lawyer could not advise his client that such a motion was so unlikely to succeed as not to be worthwhile. A lawyer would certainly be justified in urging his opinion on the client and in telling his

[4] That Ms. Benjamin might theoretically have been released is demonstrated by the fact that after she secured her release without respondent's aid, she was again arrested. On this later arrest, her lawyer managed to secure her release.

client that the lawyer's time and efforts would be better spent on other aspects of the case. However, if the client, having heard his lawyer's opinion and having understood it, rejects it and insists upon a bond review motion being filed, the lawyer is obligated to pursue his client's lawful objectives through reasonably available means permitted by law.

There is no question that a bond review motion is a reasonably available means permitted by law. The respondent in this case flatly refused to file such a motion despite repeated requests by his client. It was his judgment that such a motion would be worthless and that the client would be better off in jail. Our point is that an attorney is not entitled to substitute his own judgment for that of the client in a matter as fundamental as whether or not to ask that the client be released pending trial. The case belongs to the client, not to the lawyer. The lawyer is bound to exercise his professional judgment in advising the client. But if the lawyer's advice on such a fundamental matter is rejected, the lawyer has only two choices: either pursue the lawful objective of the client or withdraw.

What the lawyer may not do is simply substitute his own judgment for that of the client and leave an incarcerated indigent client isolated in the District of Columbia Jail with no one to turn to, his lawyer having simply overruled him.

When a lawyer represents an indigent criminal client, particularly one who is incarcerated, his duty is particularly compelling. For an indigent locked up in the District of Columbia Jail, the world is a hostile place indeed. Communications with one's family and friends and neighbors may be difficult or virtually impossible. The incarcerated indigent typically has few or no re-

sources with which to deal with the many problems that confront him. The one person in the complex criminal justice system who is supposed to be unreservedly devoted to the interests of such a client is the appointed lawyer. When that lawyer ignores the views of the client, the client is left completely without assistance in a world that is then unrelievedly hostile.

D. *Respondent's Attempt to Thwart His Client's Plea of Guilty.*

We part company with the Hearing Committee on the issue of respondent's handling of his client's attempt to plead guilty. In this case, complainant received contradictory advise from two different lawyers. One lawyer, Mr. Bright, urged complainant to accept a package plea of guilty in several cases, one of which was the case in which respondent was representing complainant. Respondent vigorously disagreed and urged his client not to accept the plea bargain.

We believe that the Hearing Committee misconstrued its role in resolving the question whether respondent intentionally failed to pursue his client's lawful objectives in this matter. Our misgivings are based upon our view that the merits of respondent's opinion concerning the wisdom of the plea bargain are absolutely irrelevant to our determination of this case. Whether respondent was right or wrong in his views of the plea bargain has no place in our deliberations nor in our decision.

We are therefore troubled by the discussion at pages 23 and 24 of the merits of the Hearing Committee's report concerning respondent's views of the plea offer as against those of Mr. Bright. We are particularly troubled by the following excerpt from page 25 of the Hearing Committee's thoughtful and carefully conceived report:

"Even if one assumes that Respondent's judgment on that point was erroneous, it was not so far fetched as to justify a finding of 'neglect' or of 'intentionally' failing to pursue a client's objectives." Frankly, we can hardly conceive of a good faith opinion of a lawyer concerning a legal matter which would be "so far fetched as to justify a finding of 'neglect' or of 'intentionally' failing to pursue a client's objectives."

A lawyer is duty-bound to exercise his best professional judgment on behalf of his client. Only where total inattention or incompetence is made out on the part of the lawyer in reaching the decision should we ever be in the business of assessing the correctness of the lawyer's advice to his client. Otherwise, we put ourselves in the position of a sort of court of appeals from lawyers' judgments. Any attempt on our part to do so would be the worst sort of second-guessing or Monday morning quarterbacking.

Therefore, we conclude that the Hearing Committee was incorrect when it discussed the rightness or wrongness of respondent's views about the plea and purported to base its decision, at least in part, upon its view of the reasonableness of respondent's views.

What is to us much more troubling concerning respondent's conduct in this matter is the fact that, after a full opportunity to urge his views upon a competent client who disagreed with those views, respondent persisted in pressing his views in open court in an attempt to thwart his client's rationally arrived at decision to accept the plea bargain.

The facts show that respondent had had a full opportunity to argue to the complainant that she should not accept the plea bargain. In fact, respondent conceded at

oral argument before the Board that he had had such an opportunity. Respondent further stated in argument before the Board that he had no doubt that the complainant was competent to make the decision that she made.

Once a lawyer's client, after full consultation, has reached a decision that the client is competent to make, then it seems to us that the lawyer is bound by that decision unless the client's decision is to seek an unlawful objective. In this case, there is absolutely no question that the client's objective—to plead guilty—was a lawful one. At that point, we believe respondent had an obligation to do his best to effectuate his client's desires. At an absolute minimum, he should have remained mute in court while the other lawyers conducted the plea procedure.

However, in this case respondent chose to take a more active role and to urge on the court his own personal views, which were in contradiction to the considered conclusion of his client. At page 4 of the transcript of the plea bargain, respondent interjected himself into the proceedings when no one had addressed him to say the following:

> MR. STANTON: Would your honor note that in [case number] 8520, I would—I would endorse the waiver of trial under protest. I advised the defendant but—that I think this plea arrangement is improvident and unwise, and I have so advised her. I ask your honor to consider that fact.

Bar Counsel Exhibit 23 at page 4.

The court correctly and accurately perceived the anomaly of what respondent was doing. The court responded as follows:

> THE COURT: Well, in what way can I consider it? She said she wished to plead guilty. I mean, the court hasn't a right to prevent a person from pleading guilty. She said she knows and understands fully what she is doing and wants to plead guilty. And, her attorney indicates the same.
>
> MR. STANTON: I just want the Court to be fully informed of all the facts in case 8520.
>
> THE COURT: Well, she is willing. There is nothing I can do, so long as she does it willingly and voluntarily. . .

Id.

Respondent's conduct, which is made out by the most clear and convincing evidence possible—his own words transcribed in open court—seems to us to be a serious violation of the Disciplinary Rules. No possible purpose of his client's was served by respondent's spreading his own personal views of the matter on the record after the client had decided to reject his advice. It is not a lawyer's place to seek to vindicate his own views, as opposed to those of his client, before a judge.

Respondent's conduct was particularly serious in the context of the importance of the transaction to Mr. Stanton's client. She was entering a plea of guilty in a series of cases. That plea would determine the status of her personal liberty for many months into the future. She earnestly believed, after full consultation with all of her lawyers, that the steps she was taking were in her best interest and would minimize the amount of time that she would ultimately have to spend in jail. Despite the clear fact, conceded by respondent, that his client was rational and fully informed, he interjected himself into

the court procedure in an attempt to thwart the client's achieving her lawful objective of pleading guilty. This conduct violates the Disciplinary Rules.

Only the wisdom and vigilance of the presiding judge prevented respondent's intemperate behavior from frustrating his client's will. The fact that respondent did not succeed in frustrating his client's attempted plea does not weigh heavily in his favor.

On two separate occasions in the instant case, respondent simply overruled his client's stated views on the grounds that he knew better than the client did. He did not have the right to do so. If his client had been wealthy, had been on release in the community, or had been better educated, she might simply have retained the services of another lawyer who would do her bidding. However, the appointed lawyer whose client is in jail has an almost entirely captive audience in his client. The client has neither the resources nor the ability quickly and easily to change lawyers, particularly in connection with a matter like bond review which must be acted upon speedily.

For all these reasons, it seems to us that an appointed lawyer with an incarcerated indigent client has a particularly high duty of fidelity to that client's considered judgments.[5] When he breaches that duty in the high-handed manner that respondent breached his duty in this case, then his conduct rises to a considerable degree of severity.

In short, we believe that respondent violated the disciplinary rules when he intentionally failed to pursue his

[5] This duty of fidelity to the client's judgment does not, in our view, extend to trial tactics and other exclusively legal or technical matters which are committed to the discretion of the lawyer acting on his client's behalf. In this case, the two matters on which respondent overruled his client were fundamentally important decisions on which the client's views must prevail.

client's lawful objective and interjected his personal views in a forum where they had no place.

E. *The Quality of Respondent's Communications With His Client.*

We pause to note that we agree with the Hearing Committee's conclusion that, where respondent had communicated with his client, it is not our business to assess the quality of those communications. A neglect charge might be made out in a situation where no communications had occurred or where those communications were inappropriately brief or truncated in view of the complexity of the matters at hand. Neither situation appears on this record. Therefore, there could be no clear and convincing evidence of neglect based upon the quality of what a lawyer told his client unless the lawyer's competence were called into question.

II. *THE WILSON CASE.*

In Docket No. 258-80, respondent was charged with a violation of DR 6-101(A)(3) in that he neglected a legal matter entrusted to him. Bar Counsel charged that respondent had failed to obtain discovery, had failed to keep his client informed of the progress of the case, and had failed to investigate the case. The Hearing Committee found that there was no clear and convincing evidence that respondent failed to obtain discovery or that he failed to keep his client informed. It did find, however, that "there is clear evidence that Respondent neglected his client's legal matter. Despite the client's repeated assertions of innocence. Respondent concluded that his client was guilty, and failed to investigate the case, as charged."

The record fully supports this finding by the Hearing Committee. The facts on which it is based are fully set forth in the Committee's report, and indeed are for the most part undisputed. They can be briefly summarized.

A. *Mr. Wilson's Criminal Case.*

Respondent's client, Mitchel Wilson, and another man were arrested on June 8, 1980, and charged with assault with intent to commit robbery. Respondent was originally assigned to represent Wilson, but, when Wilson was found to be ineligible for legal assistance under the Criminal Justice Act, respondent was retained for the flat fee of $1,000—$200 to be paid immediately, and $800 to be paid at the rate of $100 per month if Wilson was indicted. Wilson told respondent that he had been identified as having assaulted the complaining witness in an alley at about 3:45 a.m. He admitted being in the area, but denied knowing anything about the incident.

At a preliminary hearing held on June 19, 1980, respondent learned that the complaining witness had told the arresting officer that he had torn the shirt of his assailant, and that, when arrested, Wilson was found to have a torn shirt stuffed in his pocket (Tr. 110). Wilson told respondent that his shirt had been torn earlier when he had played basketball with a friend, David Williams. Wilson gave respondent Williams' address, but not his telephone number. Because of that fact, respondent concluded that Wilson had no real interest in calling Williams, and that Williams was not a genuine witness. Respondent therefore made no attempt to contact Williams (Tr. 111).[6]

The government offered to accept, before indictment, a plea of guilty to attempted robbery with the government not opposing Federal Youth Act Probation. Mitchell refused to plead guilty, asserting his innocence (Tr. 73). On July 8, respondent sent a letter to Judge Ugast

[6] Wilson also named two other persons, friends of his co-defendant, who, he said, could testify that he had been drinking at a bar near the place that the assault occurred. Respondent concluded that even if the witnesses could be found, their testimony would not be helpful, and he therefore made no attempt to identify or interview them (Tr. 113).

stating that, if his client could be assured of a sentence under the Youth Act, he would recommend that the client plead guilty. That letter was not answered. Respondent at that time had made no investigation of the case beyond talking with his client and hearing the testimony of the officers at the preliminary hearing (Tr. 126).

Wilson and his co-defendant were indicted and were arraigned on October 14, 1980. On November 13, respondent testified, he had a half-hour telephone conversation with the Assistant United States Attorney in charge of the case (Tr. 109). On November 17, after a status hearing, respondent had a conference with his client, the co-defendant, and the co-defendant's attorney. Respondent testified that, by that time, he had concluded that his client had been involved in the incident. He so informed his client. His advice was that the defendants not take the stand, but that he would try to "knock down" the governments' case (Tr. 113-114). Respondent testified that he intended to interview the complaining witness, but had not done so by January 16, 1981, although the trial date was set for January 19, 1981 (Tr. 115).

On January 16, 1981, respondent learned that Wilson had hired another attorney. He called Wilson and berated him, using offensive language (Tr. 115-116). On January 19, 1981, the date originally set for trial, the case was postponed. Respondent sought out Wilson's mother and berated her for Wilson's change of attorneys. The mother felt so harassed by respondent's conduct that she complained to Bar Counsel, instituting the investigation which eventually led to the instant charges (Tr. 16-18).

Wilson and his co-defendant were acquitted at the trial which was held in March, 1981.

B. *Respondent's Failure to Investigate His Client's Case.*

Respondent objects to the finding of neglect, asserting that his judgment as to the lack of genuineness and rele-

vancy of Wilson's alleged witnesses was correct and justified by later events. But the failure to seek out and interview these witnesses was not the only basis for the committee's finding that respondent was guilty of neglect.

Assuming, as respondent claimed, that his telephone conversation with the Assistant United States Attorney on November 13, 1981, constituted adequate discovery, it came much too late. Respondent was retained on June 11. He learned the basic facts of the government's case from the preliminary hearing on June 19, 1980. Yet between that time and November 13, respondent did nothing to investigate the facts of the case and did nothing to advance his client's cause except to write the letter to Judge Ugast.

As the Committee pointed out, respondent undertook no investigation or discovery within the period provided for filing a motion to suppress. Since the crime took place at 3:45 a.m. in the morning in an alley, there was a distinct possibility (as respondent himself apparently recognized by his plan to "knock down" the government's case) that there could have been a misidentification. Nevertheless, respondent did not attempt to interview the police officers or the complaining witness; he did not examine the torn shirt to see whether the tear was compatible with the version offered by the witness or by his client; he did not investigate or send someone to investigate the scene of the crime to determine whether lighting at the time of the offense made identification possible.

Respondent made a determination, on his own, that no investigation was necessary because his client was guilty. The Committee thus properly found that respondent had neglected his client's case in violation of DR 6-101(A)(3).

III. *RECOMMENDED SANCTION.*

We consider the two cases together for the purposes of determining the sanction that we recommend be imposed for respondent's actions. In the Benjamin case, the Com-

mittee recommended an informal admonition; in the Wilson case, it recommended suspension for ten days. We think neither sanction is adequate in itself and certainly not adequate when respondent's conduct is considered as a whole with respect to the two charges.

Although the facts of the two cases are distinct, respondent's conduct manifests the same underlying misconception of his obligation as an attorney. Respondent does not consider it his duty to be a representative or advocate for his client. He seems to think of himself as an arbiter who has the right to make decisions for his clients regardless of their wishes. Thus, in the Benjamin case, respondent insisted on telling the judge that he did not approve of his client's decision to plead guilty. In the Wilson case, he decided early that the client was guilty, despite the client's insistence on his innocence, and therefore felt it unnecessary to interview the client's suggested witnesses or to make any investigation.

Respondent's insistence on the validity of his own judgment, without regard to the wishes of his clients, is emphasized by the hostility that he displayed when his judgment was questioned. In the Benjamin case, the Committee noted that respondent's conduct was stubborn, petulant and abrasive, in one instance stopping just short of violence. In the Wilson case, respondent admitted becoming angry when the client chose a new attorney and therefore abusing the client with intemperate language. Several days later, on the date set for trial, respondent sought out Wilson's mother and subjected her to such abuse that she felt impelled to complain to Bar Counsel.

While in each case, the Committee expressly disclaimed basing its findings on respondent's unprofessional demeanor in these respects, we think that the arrogance respondent displayed in his dealing with his client is properly taken into account as reflecting his lack of a sense of professional responsibility. This lack caused the

specific acts of misconduct that we have found have been established by the evidence.

There are no precise precedents in this jurisdiction for the type of misconduct we have found exhibited in these cases (three instances of willful refusal to pursue the client's lawful objectives in two separate cases), but we think that the totality of circumstances warrants suspension for a period of sixty days.

In the Wilson case, respondent sued his client for the $600 not paid under the original $1,000 retainer. He obtained a default judgment for that amount, but a motion to open the default was pending at the time of the hearing. The Hearing Committee was of the view that respondent had earned no more than the $400 he had originally received and recommended that, if respondent recovered any more, he should make restitution to Wilson. At the time of argument before the Board, we were informed that the default had been opened; that respondent's claim had been litigated with Wilson being represented by Law Students in Court; and that the matter was awaiting decision. Since the issue of the fee is *sub judice*, we do not believe that it is appropriate for the Board to pass on the matter. We therefore make no recommendation with respect to restitution.

Accordingly, we recommend that respondent be suspended for a period of sixty days.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /s/ Beatrice Rosenberg
BEATRICE ROSENBERG

By: /s/ Mark W. Foster
MARK W. FOSTER

Date: June 15, 1982

All members of the Board participated in this matter and join in this recommendation, except Mrs. King, who feels that a thirty-day suspension is the appropriate sanction.

DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of *

JOHN J. STANTON, * Case No. M124-82

A Member of the Bar
of the District of
Columbia Court of Appeals *

DISCIPLINARY PROCEEDING UNDER
RULE XI-7 OF THE RULES GOVERNING
THE BAR OF THE DISTRICT OF COLUMBIA

RESPONDENT'S BRIEF TO THE COURT

JOHN J. STANTON #168997
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Counsel for Respondent
(Pro Se)

Bar Docket Nos.: 180-79
468-79
258-80

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In respondent's opinion, the following issues are presented for review:

(A) Whether respondent is guilty of misconduct in terms of the American Bar Association's Code of Professional Responsibility in any of "three instances of willful refusal to pursue" the client objectives in two criminal cases, as alleged by the disciplinary board, where the record shows that respondent, consistently with pertinent provisions of the American Bar Association's Criminal Justice Standards Relating to the Defense Function but inconsistently with the disciplinary board's subsequent edict demanding "fidelity to the client's judgment," (1) advised client Benjamin that her proposed motion for review of conditions of pretrial release in criminal . . . case M8520-79 would be frivolous and unfounded in his informed professional judgment and declined to undertake it while advising her to make an effort to meet the financial condition the court had imposed, (2) informed the court

hearing Benjamin's guilty pleas in cases M8520-79 and M9622-79 that he had advised her that the pleas were "improvident and unwise," and (3) disagreed with client Wilson as to trial strategy in case F2924-80, advised Wilson not to testify, and proposed, months before trial, an alternative strategy to which defendant Wilson gave his apparent concurrence; and, in all three instances, acted as an independent, professional representative rather than as an ordinary agent; and

(B) Whether the disciplinary board should be reformed to ensure that its rulemaking and adjudicative procedures and practices are lawful and consistent with the due process principles in light of a record showing that it has adopted rules of procedure inconsistent with rules promulgaged by the court, that is refuses to acknowledge the applicability of due process rights to the disciplinary process, and that its investigative and adjudicatory practices have produced an irregular vindictive

and inquisitory action involving favoritism, personal considerations, and an arbitrary, unlawful recommendation of discipline for conduct which caused neither actual nor theoretical prejudice to the client but which was fully in accord with applicable law.

II. STATEMENT OF THE CASE

This case is before the court for review pursuant to Bar Rule XI-7(e) following the disciplinary board's recommendation that respondent be suspended from practice for sixty days for alleged misconduct, for which there are "no precise precedents in this jurisdiction," involving "three instances of willful refusal," according to the disciplinary board's report, to pursue the client's objectives in two separate criminal cases, M8520-79 involving defendant Peggy Benjamin and F2924-80 involving defendant Mitchel Wilson. The disciplinary board's report and recommendation was based on two hearing committee reports,

the first addressing the Benjamin case and the second addressing the Wilson case. Separate petitions were filed by bar counsel, who sought to join them in a single evidentiary hearing, but the hearing committee considered and reported on the petitions separately. This statement offers a chronological summary of the facts relevant to the issues presented for review in the form of the disciplinary board's findings and conclusions and of the procedural actions taken by all concerned in the proceedings below.

A. Cases 180-79 (Benjamin) and 468-79 (Bright)

Respondent was appointed by the Superior Court on 20 August 1979 to represent defendant Peggy Benjamin in criminal case M8520-79. The transcript of the arraignment hearing that day shows that the court was informed that a third party custody supervisory agency, Bonabond, was "willing to continue its supervision" (Exhibit B, Tab 23C) of defendant Benjamin if she were released pending trial. The court entered an order imposing a cash bond of $100

to assure her appearance.

A few days later, Benjamin wrote a letter to respondent directing him to "file a motion ... to have a bond review" (Exhibit C, Tab 23C) because Bonabond "had agree to take [her] out... if the judge would let them" (Ibid.). Shortly after mailing this letter, she phoned respondent, and he advised her that this information had already been presented to the court and could not support a motion to set aside the $100 bond. Respondent advised her to make an effort to post the bond, offered to "help coordinate efforts" (Answer, Tab 23C, at 2) and said he would "again discuss the filing of a bond review motion ... if no efforts could be obtained" (Ibid.). While seeming to accept respondent's advise (Id.), Benjamin "got annoyed with him and hung up" (Transcript, Tab 24, at 32), venting her anger by phoning bar counsel on 29 August 1979 to complain that respondent had "not kept in touch," had "not tried to get bond reduced," and had "failed to

file bond" (Exhibit D, Tab 23C). On 7 September 1979, she was released after posting the $100 bond.

On 14 September 1979, Benjamin was arrested in case M9622-79 and released pending a pretrial hearing on 4 October 1979, the same date previously set for the pretrial hearing in case M8520-79. On 25 September 1979, she was sentenced by Judge Neilson to consecutive terms in cases M3347-79 and M5453-79 and committed.

On 3 October 1979, the United States Attorney made to Stephen B. Bright, appointed counsel in case M9622-79, a plea offer (Exhibit G, Tab 23C) essentially requiring guilty pleas in both case M9622-79 and M8520-79 and exposing Benjamin to as much as four years in prison. A deadline for accepting this offer was set for 15 October 1979. Respondent advised Benjamin that she should not accept it, that she was "bound to get more jail time" (Transcript, Tab 24, at 68, 78) if she did. Bright, however, advised her that she had a "chance for concur-

rent time" (Transcript, Tab 24, at 191-192; Transcript, Tab 22, at 39-41; Exhibit M, Tab 23C) by accepting the offer, and she then decided to accept it by tendering her pleas to Judge Neilson on 15 October 1979. During that hearing, respondent stated that he had advised her that it would be "improvident and unwise" (Exhibit I, Tab 23C, at 4).

On or about 30 October 1979, Bright complained to bar counsel's investigator, William Erhardt, that respondent's advice to Benjamin had been motivated by a desire "to pad his voucher" (Exhibit J, Tab 23C; Transcript, Tab 24, at 182). Bar counsel then on 9 November opened a formal investigation under docket no. 180-79.

On 18 April 1980, bar counsel dismissed this action while admonishing respondent for his "refusal to acquiesce to the plea agreement" (Exhibit Q, Tab 23C). Respondent protested this admonition in a letter criticizing Bright, who on 21 May 1980 urged bar counsel to investigate whether respondent's

practice made it "impossible" (Exhibit S, Tab 23C) for his clients to plead guilty. Bar counsel accommodated Bright by opening a new investigation under docket no. 468-79 and then reopened docket no. 180-79 on 16 June 1980.

In September 1980, bar counsel proposed to dismiss both actions yet misinformed the reviewing contact member [1] (Tab 3), who requested further investigation. When respondent criticized Bright for statements made in connection with that investigation, bar counsel on 18 November retaliated [2] with an informal admonition noting that Benjamin, by pleading guilty,

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1/ Neither bar counsel, the hearing committee, nor the disciplinary board has disputed respondent's allegation that the contact member, now Judge King of the Superior Court, was misinformed as to the facts.

2/ Bar counsel has not denied that he "responded with an informal admonition" (Brief, Tab 33, at 5) when respondent denounced Bright's "reprehenible character," "contemptible pusillanimity," and "prevarication" (Ibid.).

hoped that "she might have a chance for concurrent sentences" (Exhibit CC, Tab 23C) and faulting respondent for not showing "any countervailing reason or consideration" (Id.) for his stance on the plea offer.

Following respondent's rejection of the informal admonition, bar counsel on 22 January 1981 filed his petition averring in part that Benjamin had been "cognizant of the possibility of receiving concurrent sentences" (Petition, paragraph 10) when she had accepted the government's plea offer against respondent's advice. Respondent on 11 February 1981 moved to challenge the legal sufficiency of the petition by means of a motion to dismiss (Tab 1). No response was ever made to this motion, nor was any ruling ever made on its merits by the disciplinary board or its hearing committee.

Respondent next challenged the legality of the disciplinary board's procedural rules 7-2(1) and 8-9(1) in a letter to board chairman Latto (Tab 6) which Latto ignored until

respondent on 1 June 1981 instituted civil action 7994-81 in the Superior Court (Tab 7) for a declaratory judgment requiring compliance with Bar Rule XI-7(2). The disciplinary board then assured the court that the hearing committee would "issue a report and recommendation ... in accord with Rule XI Sec. 7(2) of the rules governing the Bar"[3/] (Tabs 9, 10).

The hearing committee chairman on 30 July 1981 issued a prehearing order (Tab 14) that set off a challenge to what respondent described as "the chairman's unilateral action in announcing for the committee his decisions on respondent's motions" (Motions, Tab 16, at 1). Responding to this challenge by arguing that the

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3/ The hearing committee report issued 4 December 1981 stated that "in light of the assurance given by the Board to the Court, this Committee determined to submit a report" (Report, Tab 29, at 4), implying that, otherwise, bar counsel's admonition would have been summarily approved, and respondent would now have a disciplinary record.

disciplinary board's rules authorizing actions by hearing committee chairmen are necessary "to avoid the delays that otherwise could occur" (Order, Tab 20, at 4), the hearing committee chairman nevertheless felt obliged to add that his rulings were made "after consulting with Amanda Pederson, Esquire, who is the other attorney-member" (Id. at 5).

On 11 September 1981, shortly before the evidentiary hearing on Benjamin's and Bright's complaints, Bright stated in a deposition that he had thought that "there was a good chance" that Judge Neilson "would possibly go along with concurrent sentencings" (Transcript, Tab 22, at 44) in cases M8520-79 and M9622-79 in spite of the fact that the judge had ordered consecutive sentences three weeks earlier in cases M3347-79 and M5453-79. Bright also denied that he had been, in effect, "coming back on the 15th with two more cases" and asking the judge "to be more lenient than he'd been on the 25th of September" (Id. at 45).

In his testimony before the hearing committee on 17 September 1981, Bright again denied having made " a request for more leniency" (Transcript, Tab 24, at 193) and also testified that it is "counsel's duty to file a bond review motion ... and that's what defense counsel is supposed to do if his client remains detained beyond 24 hours" (Id. at 200-201).

On 4 December 1981, the hearing committee submitted its report recommending discipline based on its conclusion that "where the client, as here, has specifically requested a bond review motion, the attorney who decides not to do so bears a heavy burden of sustaining such decision" (Report, Tab 29, at 16). On the "Government plea offer dispute" (Id. at 9), the hearing committee concluded that "the Disciplinary Rules do not require an attorney who, in good faith, believes that acceptance of a plea offer is improvident, [to] refrain from so advising the court at the time that his client nonetheless accepts the plea offer" (Id. at 25).

After receiving briefs on the hearing committee report and hearing oral arguments, the disciplinary board concluded in its report that "a violation was made out in connection with the bond review matter" and also "in connection with the government plea offer matter" (Report, Tab 46, at 2), disagreeing with the hearing committee's conclusion. In reaction to some of respondent's criticisms of its procedures and practices, the disciplinary board characterized contact member review as an "additional" (Id. at 5) protection from "wholly" (Ibid.) unsubstantiated charges, argued that disciplinary cases must not be "decided on motions" (Id. at 6) because the "several layers of due process protections ... are inappropriate in the disciplinary system" (Id. at 7), and stated that "the hearing committee chair is under no obligation to consult with other members of the committee in ... prehearing" (Id. at 8) matters.

B. Case 258-80 (Wilson)

In June 1980, respondent was retained by defendant Mitchel Wilson to provide "legal services and defense" (Exhibit A, Tab 35C) in Superior Court criminal case F2924-80, in which Wilson had been charged with assault with intent to rob the government's complainant "in the alley behind the 1800 block of M Street, Northwest" (Transcript, Tab 37, at 105) while codefendant Henry Knight "looked around and acted as a lookout" (Ibid.).

Wilson proposed to defend against the charge by testifying at trial that, on the date of the offense, he and Knight "had spent the whole night on M Street drinking in a bar called King Arthur's" (Id. at 80), thus putting himself at the place where and the time when" (Id. at 113) the offense occurred. Wilson also proposed to testify that he "knew nothing" (Id. at 111) about the assault and that "David Williams" (Ibid.), not the complainant, had been responsible for the torn shirt that had been seized as identifying evidence.

Because Wilson "would not cooperate" (Ibid.) with respondent in his investigation, respondent concluded that Wilson was "holding back," "not being candid" (Id. at 113), and, "in all probability ... guilty as charged" (Answer, Tab 35C, at 1-2). Respondent advised him on 17 November 1980, more than two months before trial, not to testify, and Wilson gave "his apparent concurrence" (Transcript, Tab 37, at 115) in respondent's alternative strategy.

On 19 January 1981, Wilson substituted counsel in case F2924-80, and Wilson's mother filed a complaint against respondent with bar counsel[4/] after respondent asked "if there was any reason he should not sue" (Exhibit C, Tab 35C) for the unpaid balance past due on the retainer agreement (Exhibit A, Tab 35C).

4/ Coincidentally, bar counsel that same date obtained approval for filing of his petition in cases 180-79 and 468-79 following respondent's rejection of the informal admonition in those cases.

On January 1981, bar counsel completed a "preliminary investigation" that "revealed," among other "allegations" (Exhibit D, Tab 35C) that respondent had "failed to perform an investigation" (Id.). Bar counsel's petition, filed in May 1981, alleged that respondent "did not investigate the case."

The hearing committee report submitted 5 February 1982 argued that respondent "concluded his client was guilty and failed to investigate the case, as charged" (Report, Tab 40, at 14). The disciplinary board restated this argument in its report to the court and added three words to emphasize respondent's exercise of independent judgment: "Respondent made a determination, on his own, that no investigation was necessary because his client was guilty" (Report, Tab 45, at 20, emphasis supplied).

III. ARGUMENT

The disciplinary board recognized that there are "no precise precedents" (Report,

Tab 46, at 21) for the charges it has brought against respondent in this case. Respondent has argued below that his conduct in two of the three instances of "willful refusal to pursue" (Id. at 22) the client's objectives was mandated by the American Bar Association's Criminal Justice Standards Relating to the Defense Function (ABA Standards) and that his conduct was consistent with the pertinent ABA Standard in the third instance. The disciplinary board has ignored this argument, and although failing to demonstrate any actual or theoretical harm or prejudice to the client in any of the three instances of alleged misconduct, thinks that "the totality of circumstances warrants suspension for a period of sixty days" (Ibid.).

As the disciplinary board's charges in this case are unprecedented, controversial, and bereft of any showing of conduct harmful to either client, what circumstances must it perceive as warranting disciplinary action? The answer to this question may be seen in the

personal level at which the disciplinary board discusses respondent's conduct and in its obstinate defense of the practices and procedures respondent has criticized, indicators that respondent has been recommended for discipline because he has criticized and disagreed with bar counsel and the disciplinary board. Underlying the specific disagreements is a fundamental difference, between respondent and the disciplinary board, in their views of the function of defense counsel in criminal cases. Respondent's criticisms of the disciplinary board have focused on the lawlessness of its practices and the inquisitorial nature of its procedures. The fact that respondent has been targeted for discipline for his outspoken disagreement and criticism shows that the disciplinary board has taken in this case unfounded, artitrary, retaliatory action indicating a compelling need for reform of its practices and procedures to secure due process rights and eliminate lawlessness in disciplinary proceedings in the District of Columbia Bar. Thus,

the first part of this argument addresses the allegations of misconduct, and the second part proposes definite reform of the disciplinary board.

A. Respondent is Not Guilty of Misconduct

No rules of law yet provide that (1) a lawyer "who refuses to file a motion ... after being instructed to do so by his client is in violation of the disciplinary rules" (Report, Tab 46, at 9), that (2) a lawyer "who, in good faith, believes that acceptance of a plea offer is improvident, must refrain from so advising the court" (Report, Tab 29, at 25), or that (3) a lawyer may not determine "on his own" (Report, Tab 46, at 20) that his client is guilty despite "the client's repeated assertions of innocence" (Id. at 17). The disciplinary board's position in each of these instances is controversial, but a controversy is not a proper context in which to recommend disciplinary action.

According to a concurring opinion in In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, a relevant inquiry in deciding whether an attorney should be disciplined is whether he "can be deemed to have been on notice that the courts would condemn the conduct for which he was [disciplined]", Id. at 554, 88 S.Ct. at 1228, as conduct "all responsible attorneys would recognize as improper for a member of the profession," Id. at 555, 88 S.Ct. at 1228. Accordingly, a court should not "deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct," Id. at 556, 88 S.Ct. at 1229. This opinion applies to all three instances cited by the disciplinary board in this case.

In the first instance, respondent determined that the bond review motion Benjamin had directed him to file would have been frivolous,

and nothing in the record suggests otherwise; further, as Benjamin had had no intention to post the $100 bond set by the court and had made no effort to post it when she directed respondent to file a motion to set it aside, it could not be said that she continued to be detained as a result of her "inability to meet the conditions of release," a circumstantial threshold for motions submitted under 23 D.C. Code 1321(d). Respondent was therefore correct in declining to file the proposed motion and in advising Benjamin to post the bond, if possible. Respondent's course of conduct in this instance was also mandated by the ABA Standards, which provide in pertinent part:

> No lawyer ... has any duty to take any steps or present dilatory or frivolous motions or any actions which are unfounded according to his informed professional judgment. On the contrary, to do so is unprofessional conduct. [Commentary, Sec. 3.9 emphasis supplied.]

According to the ABA Standards, 'The term "unprofessional conduct" has been chosen to designate violations of duties of such clear

and high order that their breach should be followed ordinarily by the imposition of some form of professional discipline, including disbarment," Id., Commentary, Sec. 1.1. Under the ABA Standards, respondent would have risked "some form of professional discipline" had he filed the motion at Benjamin's direction, yet he has been prosecuted by bar counsel and the disciplinary board for adhering to the ABA Standards. Obviously, respondent's conduct in this instance is that on which "responsible attorneys," the American Bar Association and the disciplinary board,[5/] "differ in appraising [its] propriety," Ruffalo, supra, and, until this court holds that the disciplinary board's appraisal should have the force of law, respondent shall continue to follow and base his judgments on the ABA Standards in considering motions under 23 D.C. Code 1321(d).

5/ Treated as "responsible" for the purposes of this argument.

In the second instance, respondent's conduct at the plea/sentencing hearing on 15 October 1979 was consistent with the ABA Standards in that a record of "a disagreement on significant matters of tactics or strategy ... should be made in a manner which protects the confidentiality of the law-client relation," ABA Standards, Sec. 5.2(c), and respondent's remarks at the hearing protected that confidentiality. The ABA Standards did not require in this instance the conduct described by the disciplinary board as "a serious violation of the Disciplinary Rules" (Report, Tab 46, at 14-15), and here there is no absolute difference or disagreement, as in the first instance, between the American Bar Association and the disciplinary board over its propriety; nevertheless, as in the first instance, it is obvious that the appraisal of respondent's conduct "is one about which reasonable men differ," Ruffalo, supra, for the disciplinary board and its own hearing committee have presented differing appraisals.

In disagreeing with its hearing committee, the disciplinary board would curtail respondent's freedom of expression[6/] without showing how its exercise could have harmed or prejudiced his client. The disciplinary board states that "Respondent's conduct was particularly serious" (Report, Tab 46, at 15) because Benjamin's plea "would determine the status of her personal liberty for many months into the future" (Ibid.),but it fails to state how respondent's conduct could have adversely affected "the status of her personal liberty."[7/] As the record shows no danger to Benjamin's legitimate interests likely to result from respondent's exercise of his constitutional right to free expression in

6/ More than insensitive to the federal constitutional right to free expression, the disciplinary board in this case appears to be downright hostile to it.

7/ To accuse respondent of "an atempt to thwart his client's achieving her lawful objective of pleading guilty" (Ibid.) it is necessary to disregard the fact that she had already "said she wished to plead guilty (Exhibit I, Tab 23C, at 4: Report, Tab 46 at 14) before he informed the court that she had rejected his advice.

this instance, there is no basis for the disciplinary board's contention that respondent "should have remained mute in court while the other lawyers handled the plea procedure" (Id. at 14).

In the third instance, respondent was confronted with a client, Mitchel Wilson, who had been positively and reliably identified as the perpetrator of an assault minutes after its perpetration, who admitted that he had been in the area of the offense, drinking in a nearby bar, for several hours, but who denied that he knew anything about it. Respondent's investigation revealed that Wilson and his codefendant had been identified by two witnesses, that Wilson had "slipped on glasses" (Transcript, Tab 37, at 108) in an attempt to disguise his identify, had "attempted to conceal his shirt, torn in the fight in the alley, by removing it and stuffing it into his pocket" (Exhibit E, Tab 35C), and had told the arresting officers that "they were pushing [their] car because something was wrong with it"

(Transcript, Tab 37, at 108).

Given these facts, Wilson's total failure to cooperate in the investigation, and Wilson's disposition, apparent to respondent from their conferences and discussions, to mislead and deceive, respondent determined that Wilson was untrustworthy and probably guilty as well. Respondent then on 17 November 1980, two months before the first scheduled trial date, frankly advised Wilson of these misgivings and proposed that neither defendant testify at trial. Wilson acceded to this proposal. He did not expressly admit guilt or involvement in the offense, nor did he protest respondent's decision, insist that further efforts be made to corroborate his account of the torn shirt. or say more about his right to testify, thus tacitly admitting the soundness of respondent's judgment.

Having rationally gauged the mertis of Wilson's case and concluded that no affirmative defense based on fact was available,

respondent presented to the defendants and the codefendant's counsel a cautious trial strategy essentially relying on the presumption of innocence and presenting evidence tending to show only innocent presence by defendants at the scene of their arrest, cocounsel Blitzer agreeing, at respondent's suggestion, to interview a prospective witness for that latter purpose. Respondent planned to interview the government's complainant and made efforts to contact him before Wilson retained new counsel.

The disciplinary board and its hearing committee ignore these facts and content that, because respondent chose not to include certain tasks in his investigation, he "failed to investigate the case, as charged" (Report, Tab 46, at 17; Report, Tab 40, at 14). No showing of materiality or foreseeable prejuduce is shown for any of these omissions, but the facts that (1) respondent engaged in plea bargaining with the prosecutor and the court in the preindictment stage of the case before

obtaining extensive discovery and (2) defendants were acquitted after testifying at trial are offered to suggest that respondent's judgment may have been inadequately informed, somehow, and that Wilson was in fact innocent. These suggestions, however, are not forthrightly presented or argued, and little reflection is needed to realize that respondent's plea bargaining, undertaken at the appropriate stage in the case, would have obtained, if successful, a substantial concession for Wilson[8/] and that the verdict did not indicate Wilson's innocence but only a reasonable doubt, based on the evidence adduced at that particular trial, as to his guilt.[9/]

8/ Wilson also stood to save a substantial sum of money, $800, under his retainer agreement with respondent if he elected to plead guilty before indictment with the understanding that probation under the Youth Act would be the sentence.

9/ Uncontroverted evidence before the hearing committee showed that defendants were acquitted in spite of their testimony and not because of it" (Transcript, Tab 37, at 144). The disciplinary board's implicit suggestion, that Wilson's testimony at trial was accepted as truthful, is not supported by substantial

Respondent's judgment, that Wilson was untruthful, untrustworthy, and probably guilty, was confirmed by Wilson's conduct and stands unaffected by the verdict. Proceeding from that judgment, respondent was obliged by the ABA Standards to advise Wilson not to testify:

> It is unprofessional conduct for a lawyer knowingly to offer false evidence. [ABA Standards, Sec. 7.5]

What the disciplinary board seems to find most disagreeable is the fact that respondent "on his own" evaluated Wilson's proposed defense and did not defer blindly to Wilson's judgment by uncritically accepting his "repeated assertions of innocence" (Report, Tab 46, at 17). The disciplinary board's objection to respondent's exercise of independent judgment places it in fundamental disagreement with the ABA Standards generally. The ABA Standards state that, "The lawyer's value to each client stems in large part from the independence of his stance as a professional representative rather than an ordi-

(continued) evidence but contrary to it.

nary agent," Commentary, Sec. 1.1(c), and that the lawyer "is the professional representative of the accused, not his alter ego." Ibid. More to the point of the Wilson case, the ABA Standards state that "decisions on what witnesses to call[10/] ... and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client," Id., Sec. 5.2(b), a provision that applies, of course, with equal force to the bond review controversy of the Benjamin case. In contrast, the disciplinary board contends that respondent should be disciplined for his belief, founded on the ABA Standards, that he "has the right to make decisions for his clients" (Report, Tab 46, at 21). Again, therefore, in the third instance, it is clear

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10/ Under Sec. 5.2(a) of the ABA Standards, Wilson had the right to decide "whether to testify in his own behalf, and, had he rejected respondent's advice not to testify, respondent would have been obligated, subject to the provisions of Sec. 7.7, to call him as a witness. Wilson did not again protest his innocence until after he retained new counsel.

that the conduct about which the disciplinary board complains is susceptible to appraisal "about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question, "Ruffalo, supra at 556, 88 S.Ct. at 1228.

In all three instances, the positions taken by the disciplinary board are commonly grounded on a view of the role of defense counsel in criminal cases wholly in conflict with the view expressed by the ABA Standards. In the ABA view, as noted, counsel is not an ordinary agent but a professional representative, not a alter ego of the accused or a mouthpiece for his client but an independent practitioner whose highest obligation is not necessarily to his client but to the administration of justice. In the view of the disciplinary board, defense counsel owes a "duty of fidelity to the client's judgment" (Report, Tab 46, at 16) and "is not entitled to substitute his own judgment for that of the

client" (Id. at 11) because the case "belongs to the client, not to the lawyer" (Ibid.), as if the criminal defendant had, if the government's case against him, a proprietary interest that counsel, as his agent, was bound to serve.

This respondent rejects the disciplinary board's view of counsel as ordinary agent and shall continue to follow and be governed by the ABA Standards until this court declares that they are no longer in effect in this jurisdiction. In taking positions inconsistent with the ABA Standards in recommending discipline, the disciplinary board, in respondent's opinion, has overstepped the bounds of law and reason for the purpose of penalizing him for disagreeing with it and for criticizing its practices and procedures. This arbitrarily punitive purpose is evident in its querulous comments on respondent's personality 11/

11/ The disciplinary board refers on page 15 of its report to respondent's "interperate behavior," on page 16 to his "high handed manner," and, on page 21, to the "unprofessional demeanor" and "arrogance" that it has

(continued on next page)

and in its obstinate defense of the plainly unlawful practices and procedures respondent has freely criticized.

The most significant and unfortunate effect of this punitive, retaliatory action is the position taken by the disciplinary board with respect to the role of defense counsel in criminal cases, for the position that counsel's role is that of an ordinary agent with a "duty of fidelity to the client's judgment" demeans the profession and would, if given effect, expose the courts to the unchecked, irresponsible practices of jailhouse lawyers.

Why has the disciplinary board espoused such a manifestly wrongful cause as "fidelity to the client's judgment?" The answer to this

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(continued from previous page)
"taken into account" in charging him with misconduct. Without consideration of whether these alleged personality traits have been established by substantial evidence, it is clearly inappropriate to charge, in effect, the respondent's conduct "rises to a considerable degree of severity" (Id. at 16) not because of what he does but because of the way he does it.

question may be found by turning to the practices and procedures respondent has criticized, for they evince the ambient lawlessness in which arbitrary actions that produce such unfortunate effects are made possible.

It is submitted that reform designed to eliminate such lawlessness and ensure due process of law in disciplinary actions by appropriate rulemaking and procedureal safeguards could effectively impress upon the disciplinary board a necessary sense of responsibility and restraint so sorely lacking in this case.

B. The Disciplinary Board Should Be Reformed

Nothing reveals more quickly the lawlessness of the disciplinary board than a look at the rules of procedure it has adopted pursuant to Bar Rule XI-4(3)(i), which requires that such rules of procedure be "not inconsistent with the rules promulgated by this court," including Rule XI-7(2):

> The hearing committee shall in every case submit a report containing its findings and recommendation, together with a record of its proceedings and briefs, if any were submitted, to the Board within 60 days after the conclusion of its hearing. [emphasis supplied]

The disciplinary board, however, disregarded the "not inconsistent" provision of Rule XI-4 (3)(i) when it adopted the following procedure concerning hearing committee reports:

> The Chairman of the hearing committee concerned shall submit to the Board, through Bar Counsel, copies of the committee's report containing its findings and recommendations within sixty days after conclusion of the hearing. No such reports are required in cases wherein the hearing committee approved Bar Counsel's imposition of an informal admonition. [Board Rule 8-9(1), emphasis supplied.]

> In the event a full hearing committee approves imposition of an informal admonition by Bar Counsel, respondent attorney shall have no right to demand another formal hearing and the matter shall be concluded. [Board Rule 7-2.]

This latter provision, that "the matter shall be concluded " also appears to derogate the right reserved to the court under Rule XI-7(3) "to review the matter and to enter an appropriate order with respect thereto, including

an order directing further proceedings."

In the instant case, it is clear that respondent would now have a disciplinary record for conduct mandated by the ABA Standards had he not challenged the procedure for summary approval of informal admonitions by his declaratory judgment action in Superior Court. Understandably, the disciplinary board makes no comment on that action in its report, and its reticence may be taken as an admission of the illegality of that procedure. The disciplinary board does attempt to defend its grant of plenary authority to hearing committee chairmen to act for their hearing committees and, in making this defense, expresses much of the autocratic outlook it has come to assume:

> We also point out that, contrary to respondent's arguments, the hearing committee chair is under no obligation to consult with other members of the committee ... and was free to act alone. [Report, Tab 46, at 8-9]

The voice of autocracy speaks loudly and defiantly in this statement. Respondent's arguments and his criticism of discretionary

actions by the hearing committee chairman were based on Rule XI-5(1):

> The committee shall act only with a concurrence of a majority of its members; provided, however, that two members shall constitute a quorum.

A plain hearing of this provision indicates that the court intended to impose on hearing committee members an obligation to consult and to reach a concurrence on adjudicative or discretionary matters without regard to whether such matters arise before, during, or after a formal hearing. This inference is also plainly drawn from the provision of Rule XI-13(4) for rulings on discovery proceedings to be "made by the hearing committee" and by that of Rule XI-13(5) for prehearing conferences at "the discretion of the hearing committee."

Notwithstanding these plain provisions, the disciplinary board declares on page 8 of its report its belief that "the rule respondent cites refers only to the final reports and recommendations that hearing committees make to this Board." No basis for this belief is shown,

nor is any explanation offered as to why, if the court intended hearing committees to function only at the formal hearing stage of the proceedings and in the subsequent final reports, that intent is not expressed or clearly implied in Rule XI.[12/] The absence of such an explanation in unremarkable in view of the clear implication of Rule XI-13(4) relating to discovery proceedings, which necessarily precede formal hearings and which, if governed by rulings "made by the hearing committee," show that the intent of the court must be to establish hearing committees to function as adjudicatory entities in the prehearing stages of

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12/ If the rules of procedure purporting to authorize hearing committee chairmen to act alone were inspired by the Rule XI provisions for such actions by the disciplinary board chairmen as assignment of contact members, Rule XI-4(3)(d), assignment of formal charges, Rule XI-4(3)(f), and extension of filing time, Rule XI-7(2), it must be said that those actions are either ministerial or, if arguably at all discretionary, not likely to affect substantial rights.

in the disciplinary board's rulemaking and adjudicative processes. In the meantime, rules of procedure adopted by the disciplinary board inconsistently with rules promulgated by the court should be set aside in an exercise of the court's duty to oversee the functioning of the board. And the disciplinary board should be given the clear directive to provide in its procedures "for cases to be decided on motions made before the hearing" (Report, Tab 46, at 6) under generally recognized rules of pleading in "contested cases."

IV. CONCLUSIONS

(A) Because the "three instances of willful refusal to pursue" the client's objectives all involve conduct about which responsible attorneys differ in appraising its propriety, the position taken by the disciplinary board in each instance is controversial and insufficient as a basis for recommending

discipline. Both petitions in this case should be dismissed.

(B) Reform of the disciplinary board by formal application of the adjudicative and rulemaking provisions of the Administrative Procedure Act should be ordered to eliminate the rulemaking abuses apparent on this record and to secure due process safeguards in disciplinary proceedings in this jurisdiction.

Appendix per Rule 30

Respondent cites under Rule 30 the following pages in the reporter's transcript of the proceedings of 17 September 1981 (Tab. 24): 6-11, 15-17, 32, 52-55, 77, 86, 92, 95, 122-126, 130-132, 142-144, 159-161, 177, 182, 187-201, 210-212, 216-221.

Certificate of Service

I certify personal service or service by first class mail of a copy of this brief on Joseph L. Mayer, Executive Attorney, Board on Professional Responsibility, 515 5th Street, N.W., #127, Washington, D.C. 20001 or his agent on 16 August 1982.

JOHN J. STANTON

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-142

IN RE JOHN J. STANTON, RESPONDENT.

A Member of the Bar of the
District of Columbia Court of Appeals

(Submitted September 15, 1983
Decided November 30, 1983)

Before NEWMAN, *Chief Judge*, and NEBEKER and MACK,* *Associate Judges*.

PER CURIAM: This matter is before us for our consideration of the Report and Recommendation of the Board on Professional Responsibility.

The Board finds two separate acts of "neglect of a legal matter . . .", 6 DR § 101(A)(3), and two separate instances of "intentional failure to seek a client's lawful objectives." 7 DR § 101(A)(1). The Board recommends suspension for a year and a day. We adopt the Board's recommendation.

Accordingly, it is ORDERED by the court that respondent John J. Stanton, be, and hereby is suspended for a year and a day from the practice of law for the reasons set forth in the appended Report and Recommendation of the Board on Professional Responsibility.

This order of suspension shall be effective thirty (30) days from the date of this opinion. D.C. App. R. 11 § 19(3).

So ordered.

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* *Associate Judge* MACK would adopt the sanction recommended by the Hearing Committee.

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Bar Docket Nos. 31-81
38-81

IN THE MATTER OF JOHN J. STANTON, RESPONDENT.

REPORT AND RECOMMENDATION

Respondent was charged in two separate cases (No. 31-81 in which the complainant was Mr. Faison and No. 38-81 in which the complainant was Mr. Johnson) with neglecting a legal matter entrusted to him [DR 6-101(A)(3)] and intentional failure to seek a client's lawful objectives [DR 7-101(A)(1)]. In the *Johnson* case, respondent was also charged with conduct prejudicial to the administration of justice [DR 1-102(A)(5)]. These cases were consolidated for hearing, and the Hearing Committee found a violation of DR 6-101(A)(3) and DR 7-101(A)(1) in the case involving complainant Faison and a violation of only DR 6-101(A)(3) in the case involving complainant Johnson.

We adopt the Hearing Committee's findings of fact as set forth on pages 2-4 and 10-11 of its Report; they are amply supported by evidence of record. We also agree with the Committee's conclusion that respondent violated DR 6-101(A)(3) in both cases. However, while the Hearing Committee did not find a violation of DR 7-101(A)(1) in the *Johnson* case, we conclude that there were violations of DR 7-101(A)(1) in both cases.[1]

[1] In the *Johnson* case, the Committee found no violation of DR 1-102(A)(5), a conclusion with which we agree.

FACTS

Faison Case

In June 1981 Mr. Faison was arrested on a felony charge. At this time there were already two misdemeanor charges pending against Faison, and shortly thereafter another misdemeanor bail-jumping charge was lodged against him for failure to appear at a hearing in one of the misdemeanor cases. Respondent was appointed as Faison's counsel in the felony case and in the misdemeanor bail-jumping case on June 13, 1981. On that day bond was set at $3,000 for both the felony and misdemeanor bail-jumping charges. A $5,000 bond had been set previously in each of the two pending misdemeanor cases. During the week of June 13, Faison twice requested respondent to file a bond review motion and in the ensuing three weeks made efforts to discuss his case with respondent. Respondent did not file such a motion and did not discuss the case with Faison.

At the urging of Faison's girlfriend, respondent made an unsuccessful attempt to reach Faison by telephone at the jail in late June. On June 25 Mr. Verrone, Faison's counsel in one of the misdemeanor cases, filed a bond review motion in which, among other things, he gave an explanation for Faison's failure to appear at the May 12 hearing which resulted in his bail-jumping charge. This motion was granted on July 1, and the bond was reduced to $2,500.[2]

On July 6, 1981, respondent conferred with Mr. Verrone about the status of the case that he was handling and the possibility of a plea bargain covering all three of the misdemeanor cases. This conversation and the

[2] In September this bond was consolidated with the bond in Faison's other misdemeanor case, which was also reduced to $2,500.

disciplinary proceedings; and it is reasonable to conclude that, had the court intended that a single hearing examiner, rather than a quorum of the hearing committee, conduct pre-hearing procedures and rule on discovery issues and other matters raised before the formal hearing, it would have so provided in Rule XI.

An administrative board or agency that disregards its enabling stricture to adopt rules of procedure "not inconsistent" with rules promulgated by the court can be expected to fail to heed those promulgations as well. In this case, respondent on 1 June 1980 asked bar counsel to investigate Bright's conduct in making false representations and in irresponsibly advising Benjamin on the government's plea offer and respondent's position on it. Respondent's request for an investigation was based on Rule XI-6 (1)(b):

> Bar Counsel shall have the power and duty ... to investigate all matters involving misconduct by an attorney subject to the jurisdiction of this court called to his attention, whether by complaint or otherwise.

Respondent's request was ignored. On 3 August 1981, respondent asked the hearing committee to direct that an investigation of Bright's conduct be opened. The hearing committee chairman replied that, in that particular matter, he lacked authority to give that direction or make a recommendation to that effect (Order, Tab 20, at 9). At oral argument before the disciplinary board on 11 March 1982, respondent renewed the request and reminded the disciplinary board of its duty under Rule XI-4(3)(a):

> To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention ...

Predictably, this renewed request was ignored, although the clear and convincing evidence that Bright had advised Benjamin to plead guilty to take a chance at receiving "concurrent time" amounted to evidence of unprofessional conduct, or grounds for discipline, under the ABA Standards:

> It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence in the accused's decision as to his plea. [Sec. 5.1(b), emphasis supplied]

Advising Benjamin that she "had a chance for concurrent time" by pleading guilty before the judge who had imposed consecutive sentences on her in two other cases three weeks earlier amounted to an inexcusable overstatement of the prospects of the case and exerted undue influence on Benjamin's decision as to her plea. Rank favoritism accounts for the decision by bar counsel and the disciplinary board to ignore this clear evidence of misconduct.

Failing to adopt valid rules of procedure or to follow rules promulgated by the court, the disciplinary board naturally fails to honor the principles of due process in its proceedings. The disciplinary board argues on page 7 of its report that "the inconvenience of a hearing" before its inquisitorial hearing committee is "a not unreasonable price to pay for the privilege of holding a license to practice law."

This argument would make the filing of a petition by bar counsel, regardless of its content, of its failure to state any offense in clear, specific terms, automatically trigger "the inconvenience of a hearing" with no opportunity to challenge the petition by motions practice.

Respondent's challenge in the form of a motion to dismiss the petition in case 180-79/468-79 aptly demonstrated that, for the most part, the petition made no allegations of misconduct and that, where allegations of misconduct may have been inferred, its averments were nullified by inconsistent or contradictory averments. This motion was never permitted to "distract the Board's attention from the central questions: was there a violation and, if so, what sanction is appropriate" (Ibid.). To answer these "central questions," a search for some violation not apparent from the petition was undertaken by the hearing committee, which found one of its own invention, and then by the disciplinary board, which proved itself to be no

less inventive than the hearing committee by finding another.

Had it considered and decided respondent's motion in a timely, lawful manner, the disciplinary board would have been constrained to dismiss the petition for failure to state an offense. Due process would have required that result, but the disciplinary board argues that motions practice is appropriate only to criminal cases, with their "several layers of due process protections," and is "inappropriate in the disciplinary system" (Ibid.). This argument ignores the fact, certainly a matter of common knowledge, that motions practice is freely available to parties in civil and administrative proceedings and is by no means limited to parties in criminal cases.

Respondent never argued to the disciplinary board that disciplinary proceedings should be comparable to criminal cases. He never demanded a jury trial or sought to apply common law rules of evidence. Respondent

argued only that due process entitled him to be heard in the same manner as a civil defendant or respondent moving under Superior Court Civil Rule 12(b)(6) or its federal counterpart. In disciplinary proceedings, it is settled that "due process safeguards must be observed," Matter of Thorup, 432 A.2d 1221, 1225. "The fundamental requisite of due process of law is the opportunity to be heard," "Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1171, and "must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues," Holt v. Virginia, 381 U.S. 131, 136, 86 S.Ct. 1375, 1378.

Bar counsel's petition in case 258-80 was so vague in its bare, conclusory allegation that respondent "did not investigate the case" that respondent stated in answer that the petition "contain[s] nothing to which to

respond" (Answer, Tab 35C, at 3). Having evaded respondent's motion to dismiss the earlier petition in case 180-79/468-79, however, the hearing committee, respondent knew, could not be expected to consider a legal challenge to this second petition.

The record of the disciplinary board's lawlessness in this case is extensive and alarming. A board that fails to follow its own rules and conducts retaliatory witch hunts for evidence of misconduct by those who disagree with its opinions and criticize its abuses becomes a menace to justice and must be restrained and confined to a lawful exercise of its prescribed jurisdiction.

It may be that the abuses documented in this case manifest an overreaction to a perceived suggestion "that there is an endemic inability on the part of the organized profession to regulate its own members," Matter of Dwyer, 399 A.2d 1, 15, or they may represent the excesses of a misguided crusader's convic-

tion that "the end justifies the means." The cause(s) of such abuses may remain obscure, but it should be possible to clearly identify a feasible remedy.

The disciplinary board has been likened to an administrative agency, Dwyer, supra at 11, in the standard employed by the court for review of its decisions. By implication, then, the disciplinary board and its hearing committees are already governed by the "contested cases" provisions of the District of Columbia Administrative Procedure Act, 1 D.C. Code 1509. The applicability of this statute should be formally recognized, as should the statutory provisions for public notice and participation in rulemaking and for filing and publishing of rules for the disciplinary board, 1 D.C. Code 1505, 1506, "so as to afford interested persons opportunity to submit data and views either orally or in writing." It is anticipated that formal application of these statutory guidelines would go far in preventing future abuses

With the publication of the report and recommendation of the Board in this case, respondent will be before the court on two separate cases involving a total of four clients. Upon consideration of all four matters together, we think that a pattern emerges in respondent's conduct that is most disturbing.

First, respondent arrogates to himself the role of decision-maker in his representation of his clients. Although, as we have said so many times in our two opinions in these cases, there are areas in which counsel's judgment should prevail, respondent's peculiar view of his duty to his clients means to him that his judgment should prevail over that of the client in the substantive areas traditionally reserved solely to the client. There is no question that the decision whether to plead guilty, as in the *Johnson* case, is committed to the client and not to the lawyer. Nevertheless, respondent feels that he is entitled actively to attempt to thwart his client's desires as in the *Wilson* case discussed in our previous report and recommendation or to stand by and allow his client to flounder without his assistance as in the *Johnson* case discussed herein.

Second, respondent's habit of keeping his clients largely in the dark about the progress of their cases is deplorable. The ABA's Minimum Standards for the Defense Function make it clear that full and complete communication with the client is an essential part of the attorney's role. Whether or not respondent cares to visit the D.C. jail to communicate with his clients is immaterial. If he chooses not to visit his clients at the jail, then he has the responsibility to devise some other means of keeping them posted as to developments in their cases.

Third, although not the basis for any disciplinary violation in this case, we think that respondent's arro-

attempted phone call to Faison at the jail were the only things done by respondent on behalf of Faison after the preliminary hearing in the felony case on June 19, 1981, until July 7, 1981.

On July 7 when Faison was in court for a status call in his misdemeanor cases, he talked to respondent and asked him to speak to the U.S. Attorney's Office about a plea bargain in the felony case. Respondent did so at that time, but the Assistant U.S. Attorney was not prepared to make a plea agreement. When Faison and respondent met in the cellblock on July 7, Faison informed respondent that he had filed a complaint the previous day with Bar Counsel concerning respondent's failure to render assistance to him.

On July 14, 1981, Bar Counsel informed respondent by letter that he was in an adversary relationship with his client and should seek permission to withdraw. On July 18 respondent rejected Bar Counsel's request that he seek permission to withdraw.

Faison was arraigned on an indictment returned in the felony case on July 29; respondent was absent due to illness and another attorney represented Faison. The felony case was continued to August 27 for a status hearing. In the meantime Faison had filed *pro se* motions for bond review and for discovery.

There was no communication between Faison and respondent after July 7, except for a meeting in the courthouse cellblock on July 24 when Faison was there for a status conference on his misdemeanor cases. Respondent did nothing on Faison's behalf after July 7.

Sometime prior to the August 27 status hearing, the court removed respondent and appointed new counsel for Faison.

Johnson Case

Mr. Johnson was arrested on October 2, 1980, on a warrant charging petty larceny. As a result of a search conducted at the time of the petty larceny arrest, he was also charged with violation of the Dangerous Drug Act.[3] On that same day respondent was appointed to represent Johnson in both of these cases.

At a preliminary hearing on the drug case on October 30, 1980, the prosecutor offered to drop one of the two charges against Johnson if he would enter a guilty plea to the other. On respondent's advice, the offer was declined. Both cases were assigned to Judge Hess who set the petty larceny case for trial on May 28 and the drug case for trial on June 4, 1981.

Respondent was not present when the larceny case was called for trial on May 28 because of his attendance in another courtroom. Based on mistaken information as to the reason for respondent's absence, Judge Hess removed respondent from the larceny case and appointed attorney Jankovich to represent Johnson in the larceny case which was continued.

The drug case came on for trial on June 4, 1981. After the jury had been impanelled, Johnson sought to enter a plea of guilty. During Johnson's attempt to plead guilty, respondent limited himself to urging Johnson to tell the court what it was that Johnson wanted. Other than responding to the court's inquiry concerning how much investigation respondent had performed, respondent said nothing to the court in aid of Johnson's attempted plea and, so far as the record shows, said

[3] He was also charged with possession of implements of crime, but this charge was evidently dropped early in the process.

nothing to Johnson except to urge Johnson to tell the court what was on his mind.

The judge declined to accept Johnson's plea on account of Johnson's apparent confusion, and the case went to trial, which resulted in Johnson's being found guilty. At the conclusion of the trial, Judge Hess removed respondent as counsel for Johnson and, on June 24, 1981, vacated the jury verdict.

Johnson was committed to jail at the conclusion of the trial. Later, Johnson did plead guilty in the larceny case, and the drug case was dropped. Johnson was then sentenced to sixty days with credit being given for the time already served. Since the time Johnson had served by then exceeded sixty days, Johnson was released at the time of his sentencing.

DISCUSSION

Our review of the extensive record in this case leaves us with no doubt that respondent neglected the legal matters of Johnson and Faison that were entrusted to him and that, in several instances, he willfully failed to pursue the lawful objectives of his two clients. The record in this case is highly detailed, and respondent contests almost none of the facts recited above. The Hearing Committee's meticulous report sets forth its findings of fact and carefully ties them to the record.

Those facts show that in the *Faison* case respondent failed to file a bond review motion when requested to do so by his client; failed to communicate in any significant fashion with his client; failed to investigate the facts of his client's case. Like the Hearing Committee, we do not reach the question whether any one of these failures by itself would amount to a violation of the disciplinary rules. Our unequivocal conclusion is that the sum total

of all of these failures violates both DR 6-101(A)(3) (neglect) and DR 7-101(A)(1) (intentional failure to seek lawful objectives).

Turning first to the bond review motion, as we pointed out in *In re Rosen*, Bar Docket Nos. 347-80, *et al.*, decided April 28, 1982, now pending in the District of Columbia Court of Appeals, there may be certain extreme situations in which a bond review motion is utterly futile. In our view, those situations are limited to ones in which there is no possibility of release.

Faison found himself in a far different situation. There is no question that securing Faison's release, given the fact that he was subject to three separate bonds, would have been a difficult undertaking indeed. However, so far as we are aware a lawyer is not excused from performing legitimate tasks on behalf of his client simply because of their difficulty. The truth is that much could have been, and was subsequently done by other counsel, to reduce Faison's bond. That being the case, the precious right of respondent's client to secure his freedom before trial should not have been so lightly put aside by respondent.

There is no doubt in this record that the client requested that a bond review motion be filed. Therefore, respondent's refusal to carry out his client's lawful objective smacks of the kind of intentional conduct that is prohibited by DR 7-101(A)(1).

We think that the Hearing Committee also correctly analyzed the question whether respondent should have made a visit to the jail to discuss the case with his client. Although as individual lawyers, members of the Board might reach a different conclusion considering respondent's blanket refusal to interview his clients in the jail,

that decision seems to us within the range of possible judgments that a lawyer could reasonably make concerning how to communicate with his clients.

However, the total absence of any meaningful discussion of this case with the client in any context or in any setting casts the entire matter in a different light. Thus, we find that even if we accept respondent's judgment in the matter of visiting the jail, we are bound to condemn his failure to find some alternative means of talking with his client about the case somewhere else.

Respondent himself admitted that the government's case against Faison was speculative in nature. Nevertheless, respondent made no effort to locate any witnesses helpful to Faison who could have bolstered his case. Respondent compounded the seriousness of his inacivity by refusing to withdraw as Faison's lawyer when notified by Bar Counsel of Faison's complaint against him. To compound matters, respondent refused to take any further action on behalf of Faison after the complaint was filed by Faison. Respondent sought no informal discovery from the prosecutor, initiated no plea negotiations, undertook no investigation, and did not speak to his client except for a brief courthouse cellblock visit when Faison was in court in connection with another case.

On the whole record in the *Faison* case, we concur in the Hearing Committee's finding that respondent violated the rules as charged.

The *Johnson* case presents a different, but equally disturbing, set of facts. Johnson had a hopeless case on the drug charge. Johnson had repeatedly told respondent that he was guilty of the charge. Johnson had signed a confession that was not subject to suppression. There were no search and seizure questions concerning the manner in which the police found the drugs in Johnson's

possession. There was no affirmative defense. Respondent himself acknowledged that a guilty verdict was a virtual certainty.

In the face of all this, respondent counselled Johnson against entering a plea, instead urging Johnson to exercise his constitutional right to put the government to its burden. We wish to state that, whether or not individual members of this Board might or might not have adopted the same strategic approach to Johnson's case, respondent's advice to Johnson in this matter is not the subject of our concern.

Respondent claims that he had a theory of Johnson's case. Johnson had been on probation at the time of his arrest on the drug charge and had not been reporting regularly to his probation officer. Respondent says he believed that Johnson's release on bond could be obtained and that Johnson could, while on bond, compile a record of reporting to the probation officer that would assist Johnson at his virtually inevitable sentencing on the drug charge. We express no opinion as to the soundness of respondent's approach in this regard since it is not our function to assess the relative merits or demerits of reasoned tactical choices made by diligent counsel.

However, even accepting respondent's view of the case, once the trial date of June 4, 1981, came around, there was not further advantage for his client in pursuing the strategy of delay. At that point, Johnson clearly wanted to plead guilty. He had repeatedly expressed to respondent his desire to do so. Nothing further could be gained for Johnson by refusing to do so. Nevertheless, in direct contravention of his client's often-repeated desire to plead guilty, respondent refused in open court to take any affirmative action to further his client's desires in the matter.

The transcript of the colloquy between Judge Hess, Johnson, and respondent at the opening of the trial makes clear beyond doubt that respondent stubbornly refused to give his client even minimal assistance in entering his plea. Johnson sought the court's attention and said that he wanted to plead guilty. The judge began a standard Rule 11 voir dire to determine the voluntariness of the plea. Johnson indicated confusion about one point. He was confused as to why his drug charge and his petty larceny case had not been consolidated since the drugs had been seized from his person at the time that he was arrested on a warrant on the petty larceny case.

Johnson's confusion could have been cleared up in a moment or two had respondent offered his client any advice or guidance. Far from offering advice and guidance to the client in order to assist him in achieving his lawful objective, respondent said nothing to his client beyond several times urging him to tell the judge what was on his mind. This conduct falls so far below the standard expected of attorneys in assisting their clients that we have not the slightest hesitation in condemning it as neglect and as a wilful failure to pursue the client's lawful objectives.

Respondent's conduct embodies a view of the lawyer's role that we simply cannot accept. Respondent's view seems to be that in a case of disagreement between respondent and his client over the proper course of action to follow, the client is on his own in attempting to follow any course not concurred in by respondent. We think it is clear that, at least as to the fundamental decisions concerning the client's case, it is the respondent's desires, so long as they are lawful, that must control.

Respondent owes his clients an obligation to pursue their objectives as they see them. Naturally, we would

defend to the fullest respondent's right, and indeed his duty, to communicate to his client his own views. However, once respondent is satisfied that his client is competent to make decisions concerning fundamental matters such as whether to plead guilty, once respondent is satisfied that the client understands the advice that he is giving, and once respondent is satisfied that the client's choice in the matter is a lawful choice, then respondent, in our view, owes his client a legal duty to use his best efforts to pursue the client's stated objective. He may not substitute his own judgment for that of the client, and he may not, as he did in the case of Johnson's plea of guilty, stand passively by while his client flounders in an attempt to achieve a perfectly reasonable goal.

We reject respondent's attempt to characterize the position set forth in the preceding paragraph as a substitution by this Board of its judgment for that of respondent. Any fair reading of the record will show that the Hearing Committee went to considerable lengths to make sure that it was not in any way substituting its judgment for that of respondent. We have tried to emulate the Hearing Committee in this regard. Nevertheless, the fact remains that there are certain bounds prescribing ethical conduct in our profession, and respondent's "judgment" cannot be used as a license to roam beyond those bounds. We find that in the *Faison* and *Johnson* cases, respondent has done so.

We are troubled by one aspect of the Hearing Committee's report. In the *Johnson* case, the Hearing Committee notes in a single, unexplained sentence at pages 11-12 that the Hearing Committee did "not find a violation of DR 7-101(A)(1) (intentional failure to seek a client's lawful objective) or DR 1-102(A)(5) (conduct prejudicial to the administration of justice)."

Later in its report, the Hearing Committee returns to the subject of conduct prejudicial to the administration of justice. The Hearing Committee explains at pages 15-16 that it does not view respondent's conduct of the trial in the *Johnson* case to amount to conduct prejudicial to the administration of justice. While respondent may have walked very close to the line, and indeed occasionally even have wandered over it, in disregarding various rulings by the court during the trial in the drug case, we do not hesitate in agreeing with the Hearing Committee that the conduct contained in this record is not a violation of the disciplinary rules. The truth is that in the fray of heated litigation, it may often be the lawyer's duty to press to the limits of the court's rulings. In doing so, counsel may occasionally and inadvertently wander across the line. Except in extreme circumstances which demonstrate a conscious, deliberate, and repeated pattern of transgressing the court's rulings, we would be very loathe to engage in *post hoc* analysis of counsel's judgment in this regard.

However, in its report the Hearing Committee never does return to the subject of why respondent's conduct in the *Johnson* case does not amount to a violation of DR 7-101(A)(1) (intentional failure to seek lawful objectives). Therefore, we have engaged in our own independent analysis of the record and find that such a violation has been clearly made out. When, at Johnson's sentencing, respondent refused to assist Johnson in entering his plea, he made a deliberate and conscious choice not to pursue the objective that his client wanted him to pursue. The conduct is not the type of inadvertent or unconscious conduct that is embraced by the disciplinary rule prohibiting neglect. It goes beyond neglect and rises to the level of conduct condemned by the disciplinary rule that prohibits intentional failures to pursue the client's

objective. We therefore disagree with the Hearing Committee's report in this one regard and recommend to the court that respondent be found in violation of DR 7-101 (A) (1).

SANCTION

The Hearing Committee conducted a separate proceeding on the issue of sanction and had before it briefs from Bar Counsel recommending suspension of a year and a day and respondent's brief, which did not address the issue of sanction but in effect asked the Committee to reconsider its decision on the violation. In a separate report and recommendation on the issue of discipline the Committee, after careful consideration, rejected Bar Counsel's proposed discipline and recommended instead that respondent be suspended from practice for 120 days. In addition, the Committee recommended that, if subsequent procedural developments made it possible, respondent's suspension in the present case as well as in his prior case (*In re Stanton*, Bar Docket Nos. 180-79, *et al.*) total no more than 120 days.

After much consideration, we cannot agree with the Hearing Committee's recommendation in this regard. Although we are always reluctant to overrule our hearing committees and particularly so where the hearing committee has done an extensive and thoughtful job of analyzing the case, as here, we are moved by different considerations in recommending a sanction to the court in this case.

The focus of our analysis is on the respondent himself. Although this Board has an undoubted duty to maintain consistency in its recommended sanctions, a matter to which we turn in a moment, we feel that the unusual circumstances of respondent's position mandate that we begin our inquiry by focusing on his particular situation.

gant and abusive manner towards his clients is relevant to the issue of sanction. The record in this and in the prior case is now replete with instances in which respondent admits that he verbally abused his client or a member of the client's family. We find his foul-mouthed conduct in this regard to be starkly unprofessional and symptomatic of contempt, even almost a feeling of anger, that respondent seems to hold routinely towards his clients.

We are not unmindful of the difficulties of serving as appointed counsel for indigent criminal defendants. This Board tries to remember that charges are easy to make and difficult to defend. Nevertheless, out of the fabric of respondent's practice, there emerges a pattern of contempt for his clients that we find deeply disturbing.

Fourth, we are impressed by the fact that respondent does not seem to have the slightest doubt about the correctness of his behavior in routinely overruling his clients' judgments. In his arguments in the various hearing committees before which he has appeared and in this Board and in the papers he has filed, respondent has taken an extreme position: namely, that he is entitled to exercise his professional judgment in almost every situation regardless of the views of his client.

The result of this extreme view is particularly harsh where respondent does not communicate fully or well with his clients. In these situations, the client has little or no opportunity to make his views known, and when he does, his judgment is overruled by his attorney.

The cumulative effect of respondent's approach to his practice falls especially heavily upon respondent's clients because they do not choose to be his clients. Respondent's practice consists largely of appointed criminal cases. His

clients have little or no choice as to who will represent them. In that situation, it seems to us that respondent has a particular obligation not to run roughshod over his client's views because they do not have available to them the protective mechanism that the client of the retained lawyer does: that is, simply to change lawyers.

We turn now to a consideration of other like cases and similar sanctions. As always, the job of drawing bright lines through the previous decisions of this Board and of the court in cases concerning neglect and wilful failure to pursue lawful objectives is a task fraught with difficulty. Nevertheless, we believe that certain broad patterns can fairly be discerned. At the lower end of the scale, the sanctions of reprimand by this Board and censure by the court have been reserved, for the most part, for single cases of neglect. *In re Williams*, Bar Docket No. 147-77; *In re Roundtree*, Disciplinary No. 31-76; *In re Rosenthal*, Bar Docket No. 118-77; *In re Mailloux*, Bar Docket No. 66-79; and *In re Hyman*, Bar Docket No. 69-79, are all cases involving simple neglect without more, all of which resulted in public reprimands. *But see In re Menard*, Bar Docket No. 278-78 (also involved violations of DR 1-102(A)(5) and 7-101(A)(1)(2) resulting in reprimand); *In re Mundle*, Bar Docket No. 442-77 (involved violations of the same additional rules also resulting in public reprimand). *In re Brown*, Bar Docket Nos. 305-77, *et al.*; *In re Guhring*, Bar Docket No. 398-78; *In re Mizel*, Bar Docket No. 77-74, all also involve simple neglect in violation of DR 6-101(A)(3) and resulted in public censures. ***But see In re Hughes***, Bar Docket No. 455-78 (also involving violations of DR 5-105(A) and DR 7-101(A)(1) and (2) resulting in public censure).

At the other end of the scale, the sanctions of disbarment or suspensions of two years or more have been,

by and large, limited to those cases involving an extremely broad pattern of neglect and/or wilful failure [4], usually joined with other disciplinary violations and/or a record of previous disciplinary violations, indicating a general unfitness to practice law. *In re Haupt*, 444 A.2d 317 (D.C.C.A. 1982) (twelve counts of neglect together with violations of numerous other disciplinary rules and prior record); *In re Spencer*, Bar Docket Nos. 222-79, *et al.* (eight counts); *In re Walsh*, Bar Docket Nos. 198-77, *et al.* (six counts); *In re Kops*, Bar Docket No. 211-77 (allowed legal clinic to collapse leaving at least four clients without representation resulting in two-year suspension).

Disbarment and lengthy suspensions have also resulted where gross negligence and wilful failure are combined with an extensive prior disciplinary record. *In re Bush*, Bar Docket No. 101-78 (gross negligence plus prior censure, two prior admonitions, and one prior reprimand resulted in disbarment); *In re Carter*, Bar Docket Nos. 170-77, *et al.* (gross negligence in two cases plus two prior suspensions resulted in disbarment); *In re Thorup* (neglect in criminal case joined with prior discipline and failure to cooperate with Bar Counsel resulted in recommendation of two-year suspension now pending in D.C.C.A.). Also, serious neglect and/or wilful failure combined with an act of dishonesty and/or prior discipline has also resulted in disbarment or a lengthy suspension. *In re Deusterdick*, D.C.C:A. No. D-9-75 (1975) (neglect leading to expiration of statute of limitations joined with false statements concerning status of claim resulted in disbarment); *In re Sawyer*, Bar Docket Nos.

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[4] We use wilful failure as a shorthand reference to the wilful failure to pursue the client's lawful objectives prohibited by DR 7-101(A)(1).

117-76, *et al.* (neglected to file two cases and subsequent misrepresentation concerning status and outcomes of cases resulted in disbarment by consent); *In re Williams*, Bar Docket Nos. 206-78, *et al.* (pattern of neglect plus commingling resulted in Board recomendation of disbarment now pending in D.C.C.A.); *In re Haupt*, 422 A.2d 768 (D.C.C.A 1980) (four counts of neglect joined with conversion of client funds resulted in three-year suspension).

However, when we turn to suspensions in the range of sixty days to a year and a day, the waters become considerably murkier. The cases involving suspensions for a year and a day include *In re Bush*, Bar Docket Nos. 63-77, *et al.* (two cases of neglect joined with presentation of false evidence to hearing committee and record of prior censure); *In re Fogel*, 422 A.2d 966 (D.C.C.A. 1980) (neglect joined with false excuses to the court and previous reprimand for neglect); *In re Smith*, Bar Docket Nos. 370-77, *et al.* (numerous cases joined with failure to honor agreement with Bar Counsel). *Bush*, *Fogel*, and *Smith*, like the present case, all involved conduct that was wilful as well as neglectful. *In re Tucker*, Bar Docket No. 155-76, involved a single act of neglect joined with conduct involving dishonesty in the conversion of funds from an estate. The sanction of one year and one day suspension was apparently tailored to fit the Board's and the Court's concern that respondent's failing mental and physical condition made it unlikely that she would be able to resume the practice of law in the future. Therefore, a suspension of a year and a day was thought appropriate in order to shift the onus to respondent of justifynig any possible future readmission to the Bar.

Cases involving suspensions of six months include *In re Lieber*, Bar Docket Nos. 384-78, *et al.* (neglect joined

with failure to honor promises to Bar Counsel); *In re Ramos*, Bar Docket Nos. 548-78, *et al.* (neglect and wilful failure resulting in expiration of statute of limitations and failure to respond to court's request for additional evidence); *In re Russell*, 424 A.2d 1087 (D.C.C.A. 1980) (wilful failure to pursue personal injury case joined with failure to turn over file to new counsel and failure to cooperate with Bar Counsel); *In re Whitlock*, 441 A.2d 989 (D.C.C.A. 1982) (neglect and wilful failure in two criminal appeals made out pattern of conduct but mitigating factors present); and *In re Roundtree*, Bar Docket No. 432-77, *et al.* (four cases of neglect and wilful failure including prior disciplinary record for neglect resulted in Board recommendation of six-month suspension now pending in D.C.C.A.).

Before turning to the cases involving suspension of three months, we note that *In re Cope*, D.C.C.A. No. M-58-80, decided January 24, 1983, the court held that respondent's conduct in neglecting two criminal appeals was "less aggravated than had been the conduct of the attorney in *Whitlock*, *supra*, who was suspended for six months."

The cases involving suspensions of three months include *In re Alexander*, Bar Docket Nos. 179-80, *et al.* (respondent, who neglected to appear for scheduled trial in one case and sent unprepared associate to hearing in another, had three prior informal admonitions; case resulted in Board recommendation of suspension of three months now pending in D.C.C.A.); *In re Dwyer*, Bar Docket Nos. 356-78, *et al.* (respondent neglected to appear three times in one case and wilfully violated client's instructions in another); *In re Harmon*, Bar Docket No. 350-79 (neglect and wilful failure in not filing suit and failure to honor promise to Bar Counsel); *In re Jamison*, Bar Docket No. 5-78 (neglect and wilful failure to file

answer on time and appeared in court late after three prior informal admonitions); *In re Knox*, Bar Docket No. 414-78 (neglect and wilful failure leading to expiration of statute of limitations after three prior informal admonitions); *In re Rosen*, Bar Docket Nos. 347-80, *et al.* (neglect and wilful failure to move for pretrial release, failure to communicate with client, and failure to conduct investigation in two cases after record of prior discipline).

Finally, in respondent Stanton's previous case before this Board involving similar conduct in two other appointed criminal cases, the Board recommended a suspension of sixty days. That recommendation is now pending in the District of Columbia Court of Appeals.

As we survey this panoply of cases, we conclude that within the range of suspension from sixty days to a year and a day, the cases do not admit of easy classification. The sanctions that this Board has recommended, and that the court has adopted, in various neglect and wilful failure cases within the range we are now discussing seemed particularly sensitive to the facts and circumstances of each individual case.

In this case, given the deep concerns that we have about respondent's failure to grasp his ethical obligations to represent his clients in accordance with their legitimate wishes, we cannot escape the conclusion that respondent is drifting towards a disastrous disciplinary situation. Therefore, we find that a suspension of a year and a day is apropriate in this case in order to give respondent an opportunity to reflect upon his ethical obligations and to force respondent to justify his readmission to active practice.

The facts in respondent's four cases are unusual. Respondent has not been guilty of neglect in the usual sense

of inadvertence or unconscious inattention. Instead, he seems to have a cohesive, although in our view completely erroneous view of his role as a lawyer. That view entitles respondent, in his judgment, freely to overrule his clients' wishes. Given the intractability of respondent's views in this regard, we think that the sanction recommended—a suspension of a year and a day—is the appropriate one.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /s/ Mark W. Foster
MARK W. FOSTER

Date: 2/15/83

All members of the Board except Mr. Webb participated in the decision of this case.

DISTRICT OF COLUMBIA
COURT OF APPEALS

In the Matter of *

JOHN J. STANTON, * Case No. 83-142

A Member of the Bar
of the District of
Columbia Court of Appeals *

DISCIPLINARY PROCEEDING UNDER
RULE XI-7 OF THE RULES GOVERNING
THE BAR OF THE DISTRICT OF COLUMBIA

RESPONDENT'S BRIEF TO THE COURT

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Bar Docket Nos: 31-81
38-81

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I. STATEMENT OF ISSUES

In respondent's opinion, the following issues are presented for review:

(A) whether respondent should be disciplined -- for his view of the attorney's role as criminal defense counsel -- on the basis of mere allegations of neglectful and intentional misconduct charged in one case for the "sum total" of his "overall performance" and in a second case for his advice on a government plea offer and for the defendant's ultimate indecision on whether to plead guilty unconditionally, after that offer had been set aside by the trial judge, or stand trial; and

(B) whether effective reform of the disciplinary system is feasible by such measures as enunciation of a reasonably definite standard for determining neglectful misconduct, amendment of the Code on Professional Responsibility provisions on intentional misconduct, replacement of the present disciplinary board by a professional agency operating under the

Administrative Procedure Act with primarily factfinding and reporting functions, and such other reforms as may contribute to fairness in disciplinary proceedings, to the orderly development of disciplinary law, and to confidence in the integrity of the disciplinary system.

II. STATEMENT OF THE CASE

This case is before the court pursuant to Bar Rule XI-7(3) following submission of the report and recommendation of the disciplinary board that respondent be suspended from practice for a year and a day for his "completely erroneous view of his role as a lawyer" (Report, Index #15, at 19), in the words of the disciplinary board, which bases its recommendation on allegations of "willful as well as neglectful" (Id. at 17) misconduct by respondent in representing criminal defendants Willie Faison in Superior Court case F3275-81 (disciplinary case 31-81) and Ronald Johnson in

Superior Court cast M10549-80 (disciplinary case 38-81). This statement of the case presented for decision to the court includes chronological summaries of the facts presented to the disciplinary board and its hearing committee and an account of the procedural processes by which those agencies considered Faison's and Johnson's complaints and produced their findings and conclusions.

A. Willie Faison's Complaint in Case 31-81

Willie Faison, "already a fugitive in two other cases" (Transcript, Index #3, at 37), M8811-80 and M4101-81 (Exhibit 7, Index #1), was arrested on 12 June 1981 and charged with felonious narcotic possession in case F3275-81 and with two counts of bail jumping in case M6377-81. On 13 June 1981, respondent was appointed by the court as counsel in cases F3275-81 and M6377-81. Initially, respondent "discussed with Faison the outstanding cases 8811-80 ... and 4101-81 ... and found out who the counsel were" (Transcript, Index #3, at 83). At the presentment hearing, "the bond

in No. F3275-81 was made to apply to M No. 6377-81" (Ibid.) at respondent's request. After the hearing, Faison proposed that respondent "file a motion of bond review" (Id. at 22), and "the question of a bond review motion came up again" (Id. at 23) in their discussion on 19 June 1981, when cases F3275-81 and F3276-81 were before the court for a probable cause hearing.

At that hearing, respondent obtained from the government's witness, the officer who had been "making narcotics observations in the vicinity of Fourteenth and U St." (Exhibit 1, Index #2, at 4) and who had orchestrated the arrests of Faison and his two codefendants, the admission that "no more than a guess" (Id. at 15) linked Faison with the suspected narcotics recovered from the codefendent.

In the "discussion in the cell block following the hearing" (Transcript, Index #3, at 131), respondent rejected Faison's proposal for a bond review motion, but such a motion

was filed "on or about the 25th of June" (Id. at 44), a few days later, in case M4101-81 by counsel Varrone representing that Faison's failure to appear in that case had been from "severe personal trauma" (Id. at 50) experienced when he had been "unable to locate" (Ibid.) his wife and children and had "lost track of the court date" (Ibid.) then subsequently failed to appear out of "fear of the consequences" (Ibid.)

At some point in "the last week of June" (Id. at 78), respondent returned a phone call from Faison's "wife," Catherine Spriggs, who told him that "Mr. Faison wanted to see him" (Id. at 76) at the jail. Respondent then "made a couple of efforts that week ... the end of June, first week of July" (Id., at 127) to reach Faison by phone but was unsuccessful. By the time respondent saw Faison at the courthouse on 7 July 1981, Faison had filled out and sent to bar counsel a prisoner's complaint form charging respondent with a "failure to respect wishes of client to have

personal interview" (Exhibit 1, Index #1) and a "failure to represent defendant by motions of several sorts" (Id.).

B. Ronald Johnson's Complaint in Case 38-81

Defendant Johnson was charged on 2 October 1980 in two separate Superior Court cases with larceny and with dangerous drug possession, and respondent was appointed as counsel in both cases. On 30 October 1980, the United States Attorney "offered to dismiss case M10548-80 (larceny) for defendant's guilty plea in case M10549-80 (dangerous drug possession)" (Exhibit 202(a), Index #1), and from then "until June 1981, he knew that the plea offer was outstanding" (Transcript, Index #4, at 218). "It was respondent's advice not to plead guilty" (Ibid.) but for defendant to "go ahead and tell the judge" (Transcript, Index #3, at 109) if he decided he "wanted to plead guilty" (Ibid.) against respondent's advice.

Respondent and his client "had to go to court four or five more times, until the case was assigned to Judge Hess" (Id. at 108; Exhibit 204, Index #1), who on 28 May 1981 substituted counsel Jankowski for respondent in case M10548-80 "on the basis of an inaccurate report" (Transcript, Index #4, at 156). When case M10549-80 proceeded to trial on 4 June 1981, it became apparent to respondent, following jury selection, that Johnson was "thinking of pleading guilty" (Transcript, Index #3, at 109). Respondent then "went and got Jankowski and told him what was going on" (Ibid.), asking him "to bring the court case file in M10548-80 to the courtroom for a possible inclusive disposition" (Exhibit 202(a), Index #1).

When the proceedings resumed, the judge advised the defendant of his "right to a trial" (Exhibit 202(b)(1), Index #1, at 2) and asked him if it was his "wish to plead

guilty" (Id. at 3). At this point,[1/] counsel Jankowski interjected an entreaty for a "dismissal of the petit larceny case" (Id. at 4) in connection with the plea, according to the standing plea offer. Judge Hess then insisted that Johnson decide whether he was "pleading guilty ... or going to trial" (Ibid.) "irrespective of the petit larceny charge" (Transcript, Index #4, at 184), which was to be resolved at "some other time" (Exhibit 202(b)(1), Index #1, at 4-5).

When Johnson hesitated in "answering the question" (Id. at 13) of whether he would plead guilty on those terms, Judge Hess ordered "that the case should go forward" (Exhibit 202(b)(2), Index #1, at 3) to trial, after which, however, he declared "that the case should not have gone forward in the first place

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1/ The Court at this point had not yet inquired "as to whether the defendant's willingness to plead guilty ... result[ed] from prior discussions between the prosecutor and the defendant or his attorney," as required by its Criminal Procedure Rule 11(d).

because the defendant indicated he did not want to go to trial and it went forward because Mr. Stanton wanted the defendant to go to trial" (Ibid.). Respondent remonstrated against the "criticism of defense counsel ... as ... nothing more than personal antipathy ... unfounded and unfair" (Id. at 5) and was "removed" (Id. at 6), again in favor of counsel Jankowski, in case M10549-80 as well.

On 24 June 1981, Judge Hess ordered that the Jury's verdict in case M10549-80 be "vacated ... [i]n view of the lack of proper legal representation of the defendant" (Exhibit 202(c), Index #1) by respondent and set the case "for a status hearing on June 30, 1981" (Ibid.), when Johnson "did ultimately plead guilty to the one and the other was dropped, which was what the offer was" (Transcript, Index #4, at 149) and what Jankowski had entreated the court to permit.

On July 1981, respondent wrote to the Commission on Judicial Disabilities and Tenure

to urge it to "undertake an investigation ... and ... consider an appropriate remedy" (Exhibit 202(a), Index #1, at 3) for what respondent characterized as an "abuse of judicial authority" (Ibid.) by Judge Hess, who then consulted with bar counsel, who began "investigating Mr. Stanton's handling of the case" (Exhibit 203, Index #1) by ordering "a transcript of the entire proceedings" (Ibid.) in case M10549-80 on 4-5 June 1981 and by obtaining from Johnson an "undated," "dictated" (Exhibit 201, Index #1) complaint charging that respondent had "made defendant go to trial for the case" (Ibid.).

C. The Procedural Processing of the Complaints

Before obtaining Johnson's complaint, bar counsel on 14 July 1981 notified respondent that he was "in an adversary posture" (Exhibit 2, Index #1) with Faison, whose complaint had already been docketed as case 31-81. Bar counsel demanded that respondent "seek the court's permission to withdraw" (Ibid.) as

counsel in case F3275-81, threatening to "advise the court" (Ibid.) of Faison's complaint, notwithstanding the confidentiality provision of Bar Rule XI-23, if respondent did not comply with this demand. Respondent did not, replying on 30 July 1981 that he remained determined "to achieve the best possible result" (Exhibit 5, Index #1) in Faison's cases. By that date, bar counsel had obtained Johnson's complaint, to which respondent replied with a copy of his 12 July 1981 letter to the Commission on Judicial Disabilities and Tenure.

On 27 August 1981, Judge Moore stated in court that he had decided to substitute counsel Varrone for respondent in case F3275-81 because "the bar counsel had called him and said that the respondent should be removed because Faison, the defendant, had filed a grievance" (Transcript, Index #3, at 87) against him with the disciplinary board. Bar counsel's petition, filed on 13 November 1981, confirmed Judge Moore's statement by relating, in paragraph 7 of count I, that bar counsel had "informed the

court that respondent was in an adversary relationship with his client and that he should be replaced as counsel."

Bar counsel's petition alleged in case 31-81 that respondent had "refused to file a bond review motion" for Faison, had "failed to communicate" with him, and had "refused to assist" him. In case 38-81, the petition restated Judge Hess's criticism and added the allegation that respondent had "failed to assist" Johnson "at the time of the attempted disposition." Respondent on 14 December 1981 objected to the petition as "defective in terms of the 'clear and specific' requirement of Bar Rule XI-7(2)" (Exhibit E, Index #1) with respect to case 31-81 and stated that he relied on "the transcripts of the related proceedings" (Id.) to show no misconduct in case 38-81.

Respondent on 6 April 1982 renewed this objection to case 31-81 in the form of a motion for more definite statement pointing out that the petition had failed to state

"whether a bond review motion was a responsibility or an assumed obligation disregarded by respondent" (Motion, Index #A), whether any "failure in communication could be attributed to respondent rather than to complainant" (Id.), or in what specific "preparations" (Id.) respondent had "refused to assist" Faison. Opposing respondent's motion, bar counsel stated that he knew "of no clearer way to allege the neglect of respondent" (Opposition, Index #E). Denying respondent's motion, the hearing committee chairman ruled that its points might "be appropriate for consideration at the hearing in evaluating the significance of the alleged [mis]conduct" (Letter, Index #F).

At the evidentiary hearing on 20 April 1982, the hearing committee accepted Faison's testimony that he and respondent had "never sat down and discussed" (Transcript, Index #3, at 55) the case as "all he has to say on this subject" (Id. at 67) and cut short cross-examination on whether Faison's complaint

had been based on anything "definite and specific" (Id. at 63, 64) in terms of respon dent's responsibilities and assumed obliga-tions. When respondent testified, the hearing committee decided to "try and resolve ... [the] charge brought by bar counsel" (Id. at 134) by demanding an account of what respondent "did for the client" (Id. at 135) that he had not "discussed or testified to"(Ibid.). Two days later, Judge Hess testified that "hind-sight" (Transcript, Index #4, at 187) indi-cated that respondent "should have arranged a plea disposition instead of trying the case" (Ibid.) and that Johnson had gone forward to trial "because he didn't get that assistance which he was entitled to" (Id. at 177) during the "discussion ... whether he should plead or not" (Id. at 176).

In his memorandum to the hearing commit-tee proposing findings and conclusions, bar counsel took the position that bond review motions are required "in all cases in which a client requests the exercise of that right

and such an exercise would not be blantantly frivolous" (Memorandum, Index #5, at 8). Bar counsel also contended that Faison "received no assistance from respondent" (Id. at 11) and that respondent has "shifted the burden of advoc[acy]" (Id. at 13) to Johnson to "say what [he wanted] to say" (Transcript, Index #4, at 145) to the court about pleading guilty on Judge Hess's terms. Later, in a reply to respondent's posthearing memorandum, bar counsel stated that, "The board's view is the same as that advanced by bar counsel" (Reply, Index #7, at 1) on bond review motions.

In its report to the disciplinary board, the hearing committee concluded that it "may not be appropriate to base a finding of neglect or intentional failure" (Report, Index #9, at 5) on respondent's "failure to file a bond review motion" (Ibid.) but that "the totality of respondent's performance in the Faison case warrants a finding of violation of the disciplinary rules" (Ibid.). In the Johnson case, the hearing committee

concluded that it was "in Johnson's interests to work out the best bargain possible" (Id. at 14) with the prosecutor and that Johnson "required the assistance of counsel to state his position" (Id. at 15) when "Judge Hess concluded that the guilty plea was not entirely without reservation" (Id. at 12). Recommending discipline, the hearing committee complained of respondent's "broader pattern" (Supplemental Report, Index #12, at 2) of acting on his own judgments" (Id. at 3) beyond what it perceived as "the limits of his discretion as an attorney" (Id. at 2).

Respondent was notified of the hearing committee's recommendation by a letter emphasizing that "it is not unusual [for the disciplinary board] to modify the recommendation of the hearing committee and to recommend to the court a more severe discipline" (letter, Index #G), an emphasis evidently intended to put respondents "on notice that the board can, and frequently does, change the findings and/or recommendations of the hearing committee"

(Letter, Index #I, emphasis added).

Bar counsel's 26 August 1982 statement of opposition to the hearing committee's recommendation described respondent's clients as "mere chessmen in a game he is trying to control" (Brief, Index #12, at 18).

At the oral argument on 14 October 1982, a disciplinary board member ventured his "guess" (Transcript, Index #J, at 31) that the board would "have to decide" (Ibid.) who would be responsible, when "the client requests to exercise that right" (Ibid.) to file a bond review motion, for deciding whether "such an exercise would not be frivolous" (Ibid.). That member also suggested that respondent should have "worked out a disposition by plea" (Id. at 31-32) in the Johnson case. Another disciplinary board member argued that the lawyer should "withdraw from the case if his opinion ... is in conflict with what the client wants" (Id. at 10).

In its report to the court, the disciplinary board held that the "sum total" (Report,

Index #15, at 5) of respondent's alleged "failures" (Ibid.) in case 31-81 amounted to "a violation of the disciplinary rules" (Ibid.), "respondent's refusal to carry out" (Id. at 6) Faison's bond review motion proposal particularly "smack[ing]" (Ibid.) of prohibited intentional conduct, which it held to have been perpetrated in case 38-81 as well in respondent's "pursuing the strategy" (Id. at 8) of "put[ting] the government to its burden" (Ibid.) past the point where, the disciplinary board contended, "there was no further advantage" (Ibid.) in that strategy. These holdings signified, the disciplinary board reported, conduct that "embodies a view of the lawyer's role" (Id. at 9) that it "simply cannot accept" (Ibid.). Because respondent's "completely erroneous view of his role as a lawyer" (Id. at 19) sometimes causes him to disagree with his clients and not automatically "pursue their objectives as they see them" (Id. at 9), the disciplinary board predicted that respondent was "drifting" (Ibid.) toward some future

"disciplinary situation" (Ibid.) and recommended that the court anticipate that situation by suspending respondent now. When respondent filed a statement of exceptions to the report, the court set a deadline for submission of this brief.

III. ARGUMENT

Respondent relies on the American Bar Association's Criminal Justice Standards Relating to the Defense Function (ABA Standards) in defending against the disciplinary board's arbitrary, unfounded charge that his "view of his role as a lawyer" is "completely erroneous" and ground for discipline. Foregoing the question of whether an "erroneous view" could be misconduct under the disciplinary rules, this argument shall proceed to expound respondent's view to provide an enlightening contrast to the incoherent and irresponsible position taken by the disciplinary board in the prosecution of this second

action against him for his disagreement with its opinions and criticism of its lawlessness. Such irresponsibility by the appointed agency of professional responsibility, moreover, signals a breakdown of the disciplinary system, a compelling need for its overhaul, and the inadequacy of the limited reform proposed by respondent in defending against the previous action in case M124-82. Accordingly, the argument shall include a presentation of respondent's view of the role of criminal defense counsel and a proposal for general, rather than limited, reform of the disciplinary process, including abolition of the present disciplinary board.

A. Respondent's View of the Role of Criminal Defense Counsel is Correctly Based on the ABA Standards

The ABA Standards state that criminal defense counsel shall function as "a professional representative rather than as an ordinary agent," Commentary, Sec. 1.1(c), yet the disciplinary board seems to dispute this

statement in arguing that counsel "owes his client an obligation to pursue thier objectives as they see them" (Report, Index #15, at 9) and "may not substitute his own judgment for that of the client" (Id. at 10), as if counsel were an "ordinary agent" subject to the full control of the principal-client in the conduct of his office and the discharge of its duties. The disciplinary board never recognizes this implication of its unsupported arguments, but they clearly depend upon an incorrect application of the agency concept to the attorney-client relationship.

Although treated as an agent in some circumstances and for some purposes, an attorney, in respondent's view, is a unique fiduciary whose role as criminal defense counsel is more comparable to that of a trustee than of an agent. The disciplinary board fails to perceive or acknowledge this distinction, misrepresents respondent's view, challenges the ABA Standards, and necessitates a discourse on counsel's role under those

standards.

"The basic test for determining whether one is an agent ... is one of control." Goldberg v. Barta, 109 A.2d 779. 782, but it does not follow that any fiduciary treated as an agent for a specific purpose must be an agent for all purposes under the control of the party for whom he is so treated specifically. In Hensley v. United States, 108 U.S. App. D.C. 242, 281 F.2d 605, decided before publication of the ABA Standards, the court held that "the relation of attorney and client is one of agency and the general rules of law applicable to agencies apply. Hence, the accused ordinarily speaks and acts through his attorney," 108 U.S. App. D.C. at 244, 281 F.2d at 607. The client in that case "did not initiate the waiver of trial by jury," Id. at 245, 281 F.2d at 608, but "he did, by his conduct at least, ratify the waiver immediately upon its being made and thus made the waiver his personal act." Ibid., by

not "making known to the court at the time his objection to or lack of concurrence in," Ibid., counsel's act. "Ordinarily, the acts and omissions of counsel are imputed to the client even though detrimental to the client's cause. This rule is necessary for the orderly conduct of litigation." Railway Express Agency, Inc. v. Hill, 250 A.2d 923, 926 (emphasis added).

Counsel is thus treated as an agent "for the orderly conduct of litigation," but that practice is no basis for treating counsel as an agent in the context of control and direction of the litigation. By implicitly treating counsel as an agent in that context, the disciplinary board, while expressing concern for the "legitimate wishes" (Report, Index #15, at 19) of counsel's clients, would establish a rule that would, ironically, produce results "detrimental to the client's cause" not infrequently and incidentally to a proper purpose but regularly and for no incidental purpose other than the aggrandizement of

In summary, it is not true that respondent "arrogates to himself the role of decision-maker in his representation of his clients" (Report, Index, #15, at 13). Respondent's role of decision-maker is ordained for him by the ABA Standards, under which the role of criminal defense counsel is analogous to that of a trustee vested with plenary discretion except for decisions expressly reserved to the defendant. Respondent's decisions in Faison's case were within his discretion while his forbearance in Johnson's case was appropriate in that the decision to be made was expressly reserved to the defendant and not within the discretion of counsel. In charging respondent with misconduct, the disciplinary board would realign the provisions of the ABA Standards by arguing that counsel was subject to the defendant's control as to the decisions at issue in Faison's case and that the defendant should have not been permitted to retain control over the decision at issue in Johnson's case.

B. The Present Disciplinary Board Should Be Abolished Under a General Reform of the Disciplinary Process

In thus contravening the ABA Standards, the disciplinary board invokes no official precedent or authority other than, perhaps, some imagined inherent or divine right to rule by decree, a practice so inimical to law and reason that the imperative need for its prevention cannot be doubted. In case M124-82, respondent proposed limited reform of the disciplinary board by formal application of the Administrative Procedure Act to its rulemaking and adjudicatory practices. Since making that proposal, respondent in the course of defending against the instant action has become convinced that the abuses manifest in the previous case and flagrant in this case are latent in the jurisprudential and institutional frameworks in which the disciplinary board has developed to its present aspect of irresponsible aggressiveness, that the integrity of the present system is compromised beyond repair, and that effective reform requires nothing less than a

the power of the disciplinary board by the degradation of counsel from a "professional representative" vested with independent judgment not subject to review except for abuse to an "ordinary agent" subjected to the control of a principal, the client, and the client's enforcer, the disciplinary board.

Little reflection or imagination is necessary to comprehend that "the defense of a criminal case is a very high-level, professional function, and it takes a highly trained man to perform it. It also requires a man who is somewhat detached and objective and not emotionally involved ... the lawyer must control the case," Burger, Counsel for the Prosecution and the Defense -- Their Roles Under the Minimum Standards, 8 Criminal Law Quarterly 2,5. "Many of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile ... The lawyer should seek to main-

tain a cooperative relationship at all stages while maintaining also the ultimate choice and responsibility for the strategic and tactical decisions in the case," ABA Standards, Commentary, Sec. 5.2(b).

This responsibility for decisions means to respondent that "a lawyer's duty to his client is that of a fiduciary or trustee," Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir.) in his role as criminal defense counsel under the ABA Standards. "In a strict sense, a 'trustee' is one who holds the legal title to property for the benefit of another. In a broad sense, the term is sometimes applied to any one standing in a fiduciary or confidential relation to another, such as an agent, attorney, bailee, etc. Strict definitions are sometimes difficult, but there are important distinctions between a 'trustee' and an 'agent,'" State v. Sartorius, 130 S.W. 2d 547, 549 (Mo.). These distinctions, however, need not define mutually

exclusive entities:

> Agents and trustees are both fiduciaries, and there is no antithesis between the two relations. An agent may or may not hold a title for the principal, but he is always subject to the principal's directions. A trustee always holds a legal or equitable title for the beneficiary, but he may or may not be subject to the beneficiary's control. When the required elements in each relation exist, this is, the holding of a title by one subject to the directions of the beneficiary, there is both an agency and a trust relation. [Restatement of Agency 2d, Sec. 14B]

Under the ABA Standards, there is "both an agency and a trust relation" in that counsel is treated as an agent "for the orderly conduct of litigation" and vested as a trustee with responsibility for decisions on his client's behalf. Certain decisions, reserved to the client to be made "after full consultation with counsel, are: (i) what plea to enter: (ii) whether to waive jury trial; [and] (iii) whether to testify in his own behalf," ABA Standards, Sec. 5.2(a), and this express reservation of limited control by the client is entirely analogous to the dynamics of the

trustee-beneficiary concept:

> An agent is subject to the control and direction of his principal, whereas neither the trustor nor the beneficiary of a trust has such a power unless it was expressly reserved or granted in the trust instrument. Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or cestui only to a limited extent and when expressly provided for. [Bogert, The Law of Trusts and Trustees, 2d Ed., Sec. 15 at 74-75]

When criminal defense counsel is appointed, the court may be said to act as settlor or trustor in providing counsel as trustee ad litem for the defendant client, whose position is comparable to that of cestui or beneficiary of a trust. Such anology is helpful in expounding respondent's view of criminal defense counsel as a fiduciary with discretionary responsibility limited only to the extent for which the ABA Standards and other rules of law expressly provide.

In the light of this view, soundly based on and inspired by the ABA Standards, it is clear beyond question that respondent's repre-

sentation of clients Faison and Johnson was in each case responsible and correct. In Faison's case, respondent was not subject to Faison's control and therefore obligated to execute the directive to file a frivolous, unethical bond review motion potentially detrimental to Faison's cause, nor did he serve at Faison's pleasure and command with a duty to appear for a personal interview whenever summoned by the client. Respondent honored the duty to seek to "maintain a cooperative relationship" by responding to Miss Sprigg's message, attempting to reach Faison by phone, and meeting with him shortly thereafter at the courthouse to find out what, if anything, Faison may have wanted to discuss; but this duty in no way inhibits counsel in his advisory function from criticizing the client or freely offering such other comments as counsel deems appropriate, whatever the client's disposition toward such remarks; thus, respondent was well within his rights

as advisor to criticize Faison for being "a first class fool" (Transcript, Index #3, at 85) with "a bad attitude ... looking for what people can do for [him]" (Ibid.) in the circumstances of Faison's case.

In Johnson's case, on the other hand, the decision at hand, whether to stand trial or plead guilty unconditionally by order of Judge Hess, was one expressly reserved to Johnson's control, ABA Standards, Sec. 5.2(a), to be made "after full consultation with counsel." When Judge Hess asked Johnson, "Now you want to plead guilty or you want the jury trial?" (Exhibit 202(b)(b), Index #1, at 13), he had had "full consultation" and knew that counsel, having advised against a conditional plea offer for consideration, did not approve an unconditional plea and was prepared "to try to do the best ... to instill a reasonable doubt as to the weight of the government's evidence" (Id. at 11) by litigating the issue of guilt. At this point, it was for Johnson, not respondent, to decide the question Judge

Hess had asked, and for respondent, against his better judgment, to represent to the court anything "in aid of Johnson's attempted plea" (Report, Index #15, at 4) would have been to impermissibly assume responsibility for a decision reserved expressly to the defendant. Respondent was then in no position to represent to the court that "Johnson clearly wanted to plead guilty" (Id. at 8) unconditionally, and he properly limited his remarks, in view of the court's order to, "Talk about the other one some other time" (Exhibit 202(b)(1), Index #1, at 4-5), to advising Johnson to decide which of the two options allowed by the court he would choose. When Johnson declined to plead unconditionally, respondent bit the bullet and conducted a trial defense that even the hearing committee was constrained to characterize as "not inappropriate" (Report, Index #9, at 16). In such circumstances, it is clear that respondent did not violate but strictly honored his fiduciary obligations to Johnson.

systematic approach including revision of the disciplinary law of neglectful and intentional failures under the Code of Professional Responsibility.

1. The Board on Professional Irresponsibility

Mechanical mindlessness would perform the function of criminal defense counsel as programmed by the disciplinary board in its simplistic misapplication of the agency concept to the control and direction of criminal cases. With no responsibility for the decisions made by an incompetent, irresponsible, or unscrupulous client other than that of treating the client's wishes as commands, conscientious counsel as the defendant's agent would be obliged to seek to withdraw his representation if unable to dissuade the principal-client from pursuing an improper course. An obstinately unwise defendant, aware of his position as principal with control over decisions generally, could force the resignation or withdrawal and appointment of any number of attorneys until

obtaining counsel sufficiently compliant and deferential to undertake whatever unethical business the client had decided upon. Nor could the law refuse to gratify the deferdant under such a program, for it would not be fair and just to grant the defendant control over decisions with one hand and frustrate the exercise of that control with the other by limiting his choice of agent-counsel to those unwilling to serve at the expense of their moral and eithical self-esteem.

This view of the conduct of criminal litigation was realized in fact in Faison's case, where respondent decided that Faison's proposed bond review motion was unlawful and where Faison then arranged for respondent's replacement by counsel who had been amenable to the bond review motion proposal respondent had rejected. Bar counsel acted in fact as Faison's enforcer of his putative right to control over decisions -- and to subjective satisfaction with counsel serving as his agent

the client does not clearly or definately express it, in order to supervise counsel's service to the client. Thus, the disciplinary board argues that "Johnson clearly wanted to plead guilty" because he had expressed a willingness to plead conditionally by accepting the government's plea offer and that respondent as counsel, like an unthinking automaton acting on the client's last expressed wish/command on pleading guilty, should have represented something to the court "in aid of Johnson's plea" when Judge Hess abruptly ordered, following Jankowski's counterproductive entreaty, that the plea be entered unconditionally.

In all probability, such considered action by respondent would have been detrimental to Johnson's cause, and there can be no doubt that the disciplinary board's view of the role of the criminal defense counsel would be apocalyptic in its effects on the defendant's cause generally, which would suffer grievous, self-inflicted detriment, and on the adminis-

tration of justice, which would deteriorate to a state of constant chaos and havoc in the courts if this view were enforceable as a matter of law. This fortunately unofficial view of criminal litigation is promoted for one purpose only: to enlarge the power and authority of the disciplinary board; for the scope of the disciplinary board's supervisory power over criminal defense counsel would be immeasurably greater over counsel acting as an agent subject to control rather than as trustee responsible for decisions. With such vast supervisory power, there would be no restraint on "second guessing and Monday morning quarterbacking," Matter of Thorup, 432 A.2d 1221, 1226, of the decisions of counsel but unrestrained disciplinary authority over counsel's performance as ordinary agent.

The disciplinary board's view of the role of criminal defense counsel, promoted to usurp power, does not depend upon official precedent or lawful authority, and this disregard for precedent and authority is

reflected in the shifting, inconsistent positions taken by the disciplinary board in the course of its vindictive campaign to discipline respondent by alleging disciplinary violations for conduct that does not conform with its arbitrary, unsupported view. In its previous report to the court, for example, the disciplinary board took the position that, "A lawyer who refuses to file a motion as fundamentally important as a bond review motion after being instructed to do so by his client is in violation of the disciplinary rules except in certain unusual circumstances," (Case M124-82, Report at 9) "limited to ones in which there is no possibility of release" (Report, Index #15, at 6). "Faison found himself in a far different situation" (Ibid.), it is contended, yet respondent's refusal to file the bond review motion as instructed by Faison is not reported as a violation of the disciplinary rules but as conduct that merely "smacks" (Ibid.) of prohibited intentional conduct, an indefinite

statement that reduces to meaningless the position previously taken. Similarly, the disciplinary board reported previously that "where respondent ha[s] communicated with his client, it is not our business to assess the quality of those communications" (Case M124-82, Report at 16), yet it now assesses the quality of respondent's communications with Faison as deficient by their "total absence of any meaningful discussion" (Report, Index #15, at 7), apparently because respondent "discusse[d] everything except what was the matter at hand" (Transcript, Index #3, at 36), according to Faison. Such is the inconsistency and lack of clear direction of the positions taken by this vacillating autocracy on the bond review motion controversy and on the quality of attorney-client communications.[2/]

2/ The disciplinary board projects its infirm sense of direction by accusing respondent of "drifting towards a disastrous disciplinary situation" (Report, Index #15, at 19). The record of its shifting positions shows that, like a ship of fools, the disciplinary board is "drifting" in the confusion of its own inconsistencies.

The disciplinary board's inability to maintain consistent positions is an indication of the lawlessness that also causes it to be unable to follow its own rules. In Faison's case, for example,respondent moved under the "clear and specific" clause of Bar Rule XI-7 (2) for a more definite statement "amending and clarifying the petition" (Motion, Index #A). The hearing committee chairman denied the motion summarily, and though he stated that its arguments might have been "appropriate for consideration at the hearing in evaluating the significance" of the hearing committee's findings, nothing in the record shows such an evaluation was ever made; and the hearing committee's, and the disciplinary board's, conclusion, that the "sum total" of respondent's "overall performance" violated the disciplinary rules, turned out to be anything but clear and specific. Also in Faison's case, bar counsel, under a sort of rulebreaking license conferred by the disciplinary board, violated the confidentiality

provision of Bar Rule XI-23(1) by informing the court in case F3275-81 of Faison's complaint against respondent prior to any recommendation of discipline and despite respondent's determination "to achieve the best possible result" in that case. When respondent contended before the hearing committee that bar counsel had acted illegally by "inform[ing] the cognizant judge of the nature of the alleged misconduct"[3/] (Memorandum, Index #6, at 4), his contention was evaded, just as the hearing committee had evaded his motion for more definite statement, under the cover that it "need not address this issue" (Report, Index #9, at 10) in "not finding that respondent,

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3/ It is no answer to argue that respondent waived his right to confidentiality by not acting to prevent bar counsel from informing the court, for any appeal to the disciplinary board would have been futile while any action outside the disciplinary board to keep the allegations confidential would have made them public.

upon pain of discipline by the bar, was required to accede to bar counsel's suggestion" (Ibid.) that he withdrew from case F3275-81.

Unable to follow its own rules the disciplinary board unwittingly invites rulebreaking and lawlessness by indiscreet statements made in the course of its vindictive campaign against respondent. The statement that a "blanket refusal" (Report, Index #15, at 6) to interview prisoners in jail is "within the range of possible judgments that a lawyer could reasonably make" (Id.) has the effect of a message that, regardless of the unnecessary, harmful consequences of such an irrational, hidebound policy, there would be not discipline recommended -- unless, of course, the disciplinary board had in the meantime changed its position taken in that statement. And in a statement that "smacks" of its own disrespect for lawful authority, the disciplinary board speaks of a "duty to press to the limits of the court's rulings" (Report, Index #15, at 11) and even "wander across the line"

(Ibid.) in "transgressing the court's rulings" (Ibid.), for which it would not, except in "extreme cases ... engage in post hoc analysis of counsel's judgment in this regard" (Ibid.). Such a statement is so irredeemably irresponsi- in its call for defiance of lawful court orders and so inexcusably obdurate in its clear assertion of a prerogative of impermissible second guessing of "counsel's judgment" that it expresses in itself a forfeiture by the disciplinary board of any further claim of leadership in the area of legal ethics or professional responsibility.

True leadership or authority relies upon confidence in the integrity of the institution established to interpret and enforce the rules by which an organization regulates the conduct of its members. The disciplinary board makes no effort to inspire confidence by painstaking study of the record and faithful application of the law in its cases. Its aim is to "expedite its cases" (Letter, Index #B), and it is reluctant to engage in "independent analysis of

the record" (Report, Index #15, at 11), preferring to "base its decision on the hearing committee report" (Letter, Index #G) and resorting to outright intimidation to discourage objections and challenges to hearing committee findings and recommendations by announcing that it "wishes to emphasize that it is not unusual for it ... to recommend to the court a more severe discipline" (Ibid.) when such objections or challenges are made.4/ Fear and intimidation, not confidence and inspiration, are the salient features of the present relationship between the disciplinary board and the subjects of its regulatory duties. This reliance on oppressive and unlawful means to maintain a position of authority produces

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4/ The disciplinary board's specious explanation of the purpose of this emphasis, that, following a hearing committee report and recommendation adverse to a respondent "unfamiliar with the disciplinary system" (Letter, Index #I), it is intended to give him "notice that the Board can, and frequently does, change the findings and/or recommendations of the hearing committee" (Ibid.), only emphasizes the arbitrary and capricious nature of the disciplinary board's adjudication.

arbitrary, vindictive prosecutions based on mere allegations against critical, dissident respondents.

2. Modest Proposals for Reform

So democratic is the ideal of effective self-regulation of the legal profession that a lawless autocracy under which "individual rights become subject to unrestrained power," Preamble, Code of Professional Responsibility, cannot inspire the confidence of the "guardians of the law," Ibid., necessary for that need to be met. In now contending that the present disciplinary board is unfit for further service, respondent remains hopeful and confident that systemic reform can salvage the autoregulatory principle while scrapping the particular agency that would regulate by means of "unrestrained power." This autocratic development did not occur overnight or from a single cause, and it seems logical to first consider its genesis in order to formulate preventive measures

assuring effective reform.

First, respondent does not believe that the disciplinary board's deplorable autocracy may be cured by a mere change of personnel on the ground that an autocracy must be the sum of its individual autocrats. The phenomenon of collective thought disorders is familiar to students of human behavior. One such student, an accomplished American diplomat, writing of the Stalinist Soviet regime, offered this observation on the paradoxical transformation of assorted individuals into an institutional persona:

> It has never ceased to be a source of wonder to me that a political regime composed of men obviously perfectly sane and robust in their personal psychic makeup could, as a collective political entity, exhibit in so extreme a degree the characteristic symptoms of an advanced psychosis. [Kennan, G., Memoirs 1925-1950, Little, Brown & Co., 1967, at 246.]

Though respondent may have reason to impugn the ethics and abilities of certain

at his pleasure -- by breaking the rule of confidentiality and suggesting to the court that respondent was "in an adversary posture" with Faison because he had disagreed with him and had not satisfied his subjective expectations.

Respondent's replacement as counsel in Johnson's case also realized in fact the disciplinary board's view of the conduct of criminal litigation. Although no express disagreement between Johnson and respondent over the providence of accepting Judge Hess's unconditional plea offer appears in the record, the disciplinary board represents that "Johnson clearly wanted to plead guilty" and approves the court's substitution of counsel after the trial to enforce Johnson's vicariously asserted right to control over decisions. In the disciplinary board's view, the authority exercising power of review over counsel's compliance with the client's directives, whether that authority be bar counsel or a court, may divine a client directive, when

disciplinary board members and aspirants, their shortcomings are apparent in their own statements and need not be discussed.5/ It is sufficient to state that their participation in the excesses and abuses of the present disciplinary board effectively disqualifies them from membership of any successor agency; moreover, it is likely that they would choose not to serve on any professional agency bound to diligent adherence to administrative procedures and strict regard for official precedent and substantive rules of law.

5/ In one instance, however, respondent feels obliged to point out that the disciplinary board member whose name appears as the author of both the report in this case and that in case M124-82 wrote as acting chairman of the hearing committee in disciplinary case 347-80 of a client's "right to tell his lawyer a lie" (Case M121-82, Report, Tab #7, at 9, n. 10). In United States v. DeCoster, C.A.D.C. #72-1283, eventually decided as reported at 199 U.S. App. D.C. 359, 628 F.2d 196, this same disciplinary board member wrote in an amicus brief (for Division V, D.C. Bar) of a "colorable defense which though ... false, would be presented to a jury by any competent counsel" (Amicus Brief, filed 22 April 1977, at 22).

Discarding the notion that the disciplinary board's errant ways must be those of its individual members in favor or plausible explications of insitutional dimension, respondent urges consideration foremost of the disciplinary law itself, which is of recent origin in the form of the Code of Professional Responsibility and not yet extensively interpreted by any substantial body of case law, especially as to "neglect" and "intentional failure" in terms of Disciplinary Rules 6-101(A)(3) and 7-101(A).

As to neglect, which the disciplinary board would construe as the omission of any act which, in its arbitrary opinion, could or should have been done by counsel, it is obvious that some elucidation of the term, undefined by DR 6-101(A)(3), is necessary for two reasons:

> Unduly vague regulations and statutes are constitutionally inadequate for two reasons. First, they deprive the individual of notice of what conduct will be

> considered proscribed or required or otherwise relevant to the agency's decision. Second, vague standards encourage arbitrary and possibly discriminatory decisions. Specific standards or guidelines operate to protect individuals against the injustice that might otherwise result from the arbitrary exercise of unbridled administrative discretion. [Woods v. District of Columbia Nurses Examining Board, 436 A.2d 369, 373-374]

"Neglect" should be spelled out, either in an opinion offering guidance and precedent or by an amendment of DR 6-101(A)(3) adding definitive language. Informal Opinion 1273 of the ABA Committee on Ethics and Professional Responsibility could be useful for that purpose. The ABA opinion defines neglect disjunctively as a "consistent failure to carry out ... assumed ... obligations or ... conscious disregard for ... responsibility." "Responsibility" and "assumed obligations" would seem to be clear, distinct duties that counsel could not disregard or fail to carry out without knowingly risking harm or prejudice to the client's cause; thus, a showing of

siast; a fanatical partisan," Webster's New International Dictionary, 2d Ed. These connotations of ardor, excess, and fanaticism are not appropriate to a mandatory, "minimum level of conduct," Preliminary Statement, Code of Professional Responsibility. For this reason, Canon 7 and DR 7-101(A) should be considered for amendment by deletion of the term "zealously" and substitution of the term "effectively" or "responsibly," that would be appropriate to a "minimum level of conduct;" for although Canon 7 contains the proviso "within the bounds of the law" and although DR 7-101(B) provides expressly for decisions to waive or not assert[6/] rights and positions, these provisions, these provisions do not seem to be sufficiently prominent

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6/ Also inartful is the use in DR 7-101(b) of the pejorative term "fail" in reference to a "permissible exercise of ... professional judgment."

to offset the effect of the adverb "zealously" in arousing expectations more appropriate to an aspirational than to a mandatory standard of conduct.

In the case of both "neglect" and "intentional failure," the correlation between the disciplinary rules and the standard for ineffective assistance of counsel in criminal cases should be set forth. Already established are the rules that "second guessing and Monday morning quarterbacking," "Thorup, supra, is as impermissible in disciplinary cases as in ineffective assistance cases and that, as in ineffective assistance cases, a "judgmental or tactical error ... revealed by later events or hindsight, does not in and of itself establish a disciplinary rule violation," Ibid.. To complete the correlation process, neglectful and intentional failures in criminal cases may be said to be misconduct that exposes the defendant's cause to possible prejudice and, for that

reason, would be deemed "gross imcompetence," "Asbell v. United States, 436 A.2d 804, 808, in terms of the ineffective assistance calculus. For disciplinary purposes, such "gross incompetence" would not have to cause actual prejudice. Theoretical prejudice, if clear and distinct, might suffice for imposition of discipline, but prejudice from neglectful or intentional misconduct, not from mistaken judgment or inadvertance, should be the ultimate determinant. A lawyer's "minimum level of conduct" should rise or fall not necessarily to win the client's case but to protect the client from injustice.

Clarification of the disciplinary rules should be accompanied by the establishment of a professional disciplinary board or committee of at least three members, all attorneys. They should receive a salary comparable to that of bar counsel. The present disciplinary board, by its inadequacy and irresponsibility, has shown that the limits

of voluntarism are insufficient to measure up to the important and demanding task of administering professional discipline, which can no longer be entrusted to amateurs seeking influence, prestige or status but unwilling or unable to devote the time and effort necessary for the fair, reasonable, and consistent consideration and adjudication of cases constructing the corpus juris for regulation of the "guardians of the law." If it is necessary to increase bar dues to provide revenue for the salaries of these disciplinary board or committee members, this respondent would gladly pay his share as the price for justice in the disciplinary system.

The functions of the court's disciplinary agency should be primarily factfinding and reporting, and it may be unrealistic to expect a disciplinary agency to function primarily as a tribunal. If bar counsel retains use of the informal admonition, however, it would be logical to empower the board or

committee to administer reprimands subject to a respondent's right to review by the court. The present procedure provides for no such right, only for a discretionary right by the court to review cases in which dismissals, informal admonition, or reprimands are contemplated or effectuated.

Rulemaking and adjudicatory proceedings before the court's disciplinary agency should be covered fully by the Administrative Procedure Act, as previously proposed. There should be no "deferential standard of review," Matter of Sheehy, 454 A.2d 1360, 1366, or "limited standard of review of recommendations of the Board," Matter of Fogel, 422 A.2d 966, 968, for it would not be "akin to an administrative agency which is presumed to have an expertise," Matter of Colson, 412 A.2d 1160, 1175, that the court lacks. The court need not assume the burden of initial factfinder in disciplinary cases, nor should it operate under an endorsement of "the Board's exercise

as to neglectful and intentional misconduct, and empowered to impose and recommend discipline subject to full review by the court in all cases.

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materiality would be necessary for an omission to constitute neglect of a duty. Moreover, even a material omission would not be chargeable as neglect, according to the ABA opinion, if resulting from a "judgment made in good faith," Id., or from inadvertance, where the harmful consequence of the omission was not or could not have been foreseen. In sum, neglect should be defined for disciplinary purposes as a material omission that risks foreseeable harm or prejudice and that is not excusable as a result of inadvertance or judgment.

If "neglect" may be defined in a judicial opinion, "intentional failure" would need an amendment of DR 7-101(A) - and Canon 7 - to be clearly perceptible. The problem seems to be the term "zealously." A "zealot" is defined as one who "pursues his object with earnestness and ardor; especially, one who is overzealous or carried away by his zeal; one absorbed in devotion to anything; an enthu-

of broad discretion in handing out discipline," Matter of Smith, 403 A.2d 296, 303, to the point of legitimate concern that is has "delegated too much authority," Fogel, supra at 969, to a disciplinary board corrupted by the lure of "unrestrained power."

IV. CONCLUSIONS

(A) Respondent's view of the role of criminal defense counsel is soundly in accord with the ABA Standards, and he may not be disciplined for that view on the basis of mere allegations of misconduct in the exercise of his professional judgment; consequently, the petition should be dismissed.

(B) The Board of Professional Responsibility should be abolished and replaced by a professional agency with primarily fact-finding and reporting functions operating under the Administrative Procedure Act, applying disciplinary rules clarified as proposed

Rule 30 Appendix

Respondent notes the following pages of the reporter's transcript of the evidentiary hearings of 20-22 April 1982: 12-18, 21-24, 28-29, 31-32, 36, 39-45, 49-51, 54, 58, 60-61, 65-67, 71-74, 79, 82-87, 94, 102, 108-111, 119-140, 147-149, 157, 161-164, 176-179, 182, 184-185, 193-198, 199-201, 208-209, 215-234.

Certificate of Service

I certify personal service or service by first class mail of a copy of this pleading on Joseph L. Mayer, Executive Attorney, Board on Professional Responsibility, 515 5th Street, N.W., Washington, D.C. 20001, or his appropriate agent on 14 April 1983.

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counsel under the Criminal Justice Act. In one case, we sustained the Board's findings that "respondent failed to file a bond review motion when requested to do so by his client; failed to communicate in any significant fashion with his client; failed to investigate the facts of his client's case." Slip op. at 6. In the other case, we agreed with the Board that "in direct contravention of his client's often-repeated desire to plead guilty, respondent refused in open court to take any affirmative action to further his client's desires in the matter . . . [and] stubbornly refused to give his client even minimal assistance in entering his plea." Slip op. at 9, 10.[18]

In suspending attorney Stanton for a year and a day, we adopted the Board's summary of this particular lawyer's defaults: he "arrogates to himself the role of decision-maker in his representation of his clients"; he keeps "his clients largely in the dark about the progress of their cases"; he exhibits an "arrogant and abusive manner towards his clients"; and he "does not seem to have the slightest doubt about the correctness of his behavior in routinely overruling his client's judgments." *Stanton II, supra*, slip op. at 14, 15.

We elaborate from *Stanton II, supra*, to show the high water mark to date in this court's discipline in the con-

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[18] In arriving at its recommended sanction, the Board took into account that previously it had recommended a 60-day suspension for respondent Stanton's actions in two other criminal cases: in one, a refusal to file a bond review motion requested by his client, as well as a refusal to assist his client in making a guilty plea, both in violation of DR 7-101(A)(1); in the other, a failure to obtain discovery, otherwise investigate, and keep the client informed of the progress of the case. This court adopted the Board's recommendation, *In re Stanton*, No. M-124-82 (D.C. Nov. 30, 1983) (*Stanton I*), ordering a 60-day suspension to be served concurrently with the year and a day suspension in *Stanton II, supra*.